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Superior Court of New Jersey

APPELLATE DIVISION.

DOCKET NO. A-552-55.

HENRIETTA KREAM,
Petitioner-Appellee,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT,
Respondent-Appellant.

Civil Action.

On Appeal from Judgment of Essex County Court—Law Division.

Sat below:
(G. Dixon Speakman, *A. J. S. C.*, Sitting in Said Court).

Affirming Judgment of Division of Workmen's Compensation.
(John C. Wegner and Stephen J. Lorenz, Deputy Directors.)

APPENDIX FOR RESPONDENT-APPELLANT.

DAVID M. SELLICK,
Attorney for and of Counsel with Respondent-Appellant,
80 Park Place,
Newark 1, New Jersey.

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APPENDIX.

Petitioner's Claim Petition for Compensation.

(Filed May 16, 1952.)

Dependent's Claim Petition for Compensation

New Jersey Department of Labor and Industry

WORKMEN'S COMPENSATION DIVISION

TRENTON, N. J.

HENRIETTA KREAM,

Petitioner,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT,

Respondent.

Received at Trenton May 16, 1952.

Claim Petition No. B 11571.

Date of Accident February 2, 1952.

If known, state name of insurance company. Self-insured.

Attorney for Petitioner. Milton Albert, 591 Summit Avenue, Jersey City 6, N. J.

To the Workmen's Compensation Division of New Jersey:

The Claimant respectfully alleges the following facts:

1. What was the full name of the decedent? Harry Kream.
2. Where did decedent live? 374 Seymour Avenue, Newark 8, N. J.
3. Sex of decedent. Male.
4. Date of birth of decedent. August 10, 1901.

Petitioner's Claim Petition for Compensation.

5. Give below, in reference to each person claimed to be dependent upon the deceased at the time of accident or death:

Name of Each Dependent	Age at Last Birthday	Date of Birthday	Relation to Decedent
Henrietta Kream	45	February 11, 1907	widow
Dora Clark	86 years		mother

6. By whom was decedent employed at the time of accident? (Give name and business address) Public Service Coordinated Transport, Public Service Terminal Building, Park Place, Newark, N. J.

7. What was the business of the employer? Public Transportation.

8. Did the decedent give a written notice to the employer at the time of hiring, or later, that the Compensation Law was not to apply to him? No.

9. Did he receive such notice from the employer? No.

10. Did the employer have knowledge of this accident? Yes.

11. Did you notify the employer of this accident?

12. If so, on what date?

13. Have you made claim to the employer for compensation? Yes.

14. What was the regular occupation of the decedent, and what kind of work was he doing at the time of the accident? Bus driver. Driving a bus.

15. When did the accident happen? February 2, 1952.

16. Where did the accident happen? On route of Bus #54 in Newark, N. J.

17. What was the nature of the accident, and how did it happen? Decedent became ill on his tour of duty. He was required and directed to drive his bus in that condition until he could be relieved. The exertion of so driving his bus aggravated his illness and resulted in his death on February 2, 1952 from injury to his heart.

18. Did deceased work any after the accident? Yes until he was relieved by another bus driver.

• • • • • •

20. Give date of death. February 2, 1952.

21. Were his wages fixed by piece work? No.

• • • • • •

24. Give number of hours in an ordinary working day 8 hyrs (hours).

25. Give number of days in an ordinary working week 5.

26. State the amount of weekly wages. $90.00.

27. How much money have you received from the employer as compensation (not medical aid) since the accident? None.

28. Has the employer promised to pay you any compensation? No.

• • • • • •

30. Was medical aid required? No. Decedent died before medical aid reached him.

• • • • • •

32. What other sum did you expend for medical, surgical or hospital service? None.

• • • • • •

34. What other facts are there which you believe important? Petitioner paid funeral bill for decedent's burial amounting to $765.00.

• • • • • •

Your petitioner therefore prays that your Honorable Bureau will determine the amount of compensation due to your petitioner from the said defendant, under the Act entitled "An Act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of the employment, establishing an elective

schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 4th, 1911, and the Acts supplemental thereto and amendatory thereof, and that your petitioner may be awarded his costs in this proceeding, and such other or further relief as may be proper.

And your petitioner will ever pray, etc.

s/ HENRIETTA KREAM,
(Petitioner)
Henrietta Kream,
374 Seymour Avenue,
Newark, N. J.

STATE OF NEW JERSEY,
COUNTY OF HUDSON. } ss.:

HENRIETTA KREAM of full age, being duly sworn according to law, on his oath deposes and says: That he is the petitioner named in the foregoing petition; that he has read the same and is familiar with the contents thereof; and that the matter and things therein set forth are true according to the best of his knowledge and belief.

s/ HENRIETTA KREAM,
(Petitioner)
Henrietta Kream,

Subscribed and sworn to before me, this 21st day of April 1952, at Jersey City, N. J.

s/. AARON GORDON

AARON GORDON,
An Attorney at Law of New Jersey.

Petitioner's Claim Petition for Compensation.

(This affidavit may be sworn to before a Deputy Commissioner or a Compensation Referee, or any other person authorized to administer an oath.)

TO THE RESPONDENT

The foregoing claim petition has been presented by the petitioner to the Workmen's Compensation Bureau for hearing and determination in accordance with the provisions of the Workmen's Compensation Act.

We hereby notify you that unless an answer shall, within ten days from the receipt of this notice, be filed with the Secretary of the Bureau, in the State House at Trenton, the facts alleged in the petition will be deemed to be admitted and no testimony will be required from the petitioner to prove such facts.

WORKMEN'S COMPENSATION BUREAU.

s/ DANIEL SPAIR,
Secretary.

Respondent's Answer to Petitioner's Claim Petition.

(Filed June 4, 1952.)

Attorney for Respondent David M. Sellick, 80 Park Place, Newark, New Jersey.

Name and address of Insurance Carrier Self.

In answer to Claim Petition filed in this cause Respondent states:

1. Name of Respondent Public Service Coordinated Transport, 80 Park Place, Newark, New Jersey.
2. Business of Respondent Electric street railway and motor bus transportation.
3. What was decedent's name? Harry Kream.
4. Where did decedent reside? 374 Seymour Avenue, Newark, New Jersey.
5. Do you question the dependency, age or relation of any of the persons named in Question No. 5 of the Claim Petition? Yes. If so, specify Respondent does not have knowledge or information sufficient to form a belief.
6. Was the decedent in your employ at the time of the alleged accident? Yes.
7. Did you receive written notice from the decedent at the time of hiring, or later, that Article 2 of the Workmen's Compensation Law of New Jersey was not to apply to him? No.
8. Did you give such written notice to him? No.
9. Did you have knowledge of an injury occurring at the time alleged in the petition? No.
10. Did you receive notice of an injury occurring at time alleged in petition? No.

11. Has any claim for compensation been made? No.

12. What was the regular occupation of the decedent, and what kind of work was he doing at the time an accident is alleged to have occurred? Decedent was a bus operator but the alleged accident never occurred and decedent suffered no injury by accident.

13. Did decedent sustain an accident arising out of his employment with the Respondent at time alleged in the petition? No.

14. Did decedent sustain an accident in the course of his employment with the Respondent at the time alleged in the petition? No.

15. If the accident occurred on a date other than the one alleged in the petition state the correct date The alleged accident never occurred.

16. Where did the accident happen? It never happened.

17. How did the accident happen? See answer to #16.

18. What was the nature of the injury? There was no injury.

19. Did decedent work after the accident? See answer to #15.

20. Give date of death February 2, 1952.

22. If wages were fixed by the hour, state rate per hour 1.79.

23. Give number of hours in an ordinary working day 5 days at 8 hours, 1 day at 4 hours.

24. Give number of days in an ordinary working week 5½.

25. State the amount of weekly wages $78.76—gross.

26. Was decedent paid any compensation for his injury? See answer to #18.

• • • • • •

27. Were alleged dependents set forth in petition paid any compensation? No.

28. Have you promised to pay compensation? No.

29. Was medical aid required? No.

• • • • • •

32. Have you paid burial expenses? No.

33. What other facts are there which you believe important? If you deny that compensation is payable in this case, or deny any allegation in the petition, explain fully your defenses Respondent denies that the decedent's death was the result of an accident arising out of and in the course of his employment and it calls upon the Petitioner for full proof of all the material and jurisdictional allegations set up in her petition. Respondent avers that the decedent's petitioner failed to comply with the provisions of R. S. 34:15-17 in that no knowledge was obtained or notice given within the required ninety days.

PUBLIC SERVICE COORDINATED TRANSPORT,
(Respondent)

By s/ DAVID M. SELLICK, Attorney,
80 Park Place, Newark, New Jersey.

Respondent's Answer to Petitioner's Claim Petition.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

F. M. LUDLOW, of full age, being duly sworn according to law, on his oath deposes and says: That he is the Agent of the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

s/ F. M. LUDLOW.

Subscribed and sworn to before me, this 4th day of June, 1952 at Newark, New Jersey.

s/ FREDERIC R. REED,
Notary Public of New Jersey.
My Commission Expires Oct. 26, 1956.

(This affidavit may be sworn to before any person authorized by law to administer an oath).

Respondent's Amended Answer to Claim Petition.

(Filed March 11, 1954.)

In Answer to Claim Petition Filed in this Cause Respondent States:

1. Name of respondent, address and business See answers to #15 and #16.

* * * * * *

15. What other facts are there which you believe important? The respondent repeats all the allegations and defenses set forth in its filed Answer to Claim Petition and said Answer is hereby amended to add the following defenses:

The petitioner commenced a suit against the respondent in the Essex County, Court, Law Division, on or about December 29, 1952, involving the same subject matter set forth in the Claim Petition filed by her in this court. She pursued and pressed said suit in the Essex County Court, Law Division, to final judgment on the merits of the case and said judgment having been entered against her and in favor of the respondent at the conclusion of the trial, on or about March 5, 1954, the subject matter of this suit is now res judicata, and the Claim Petition should be dismissed. (See answer to #16.)

16. If you deny that compensation is payable in this case, set forth reasons. (See answer to #15.)

The petitioner elected her remedy by commencing, pursuing, and pressing the aforesaid suit, involving the same subject matter, to final judgment in the Essex County Court, Law Division, and she is now estopped and barred from proceeding in this Court, and the Claim Petition should be dismissed.

Respondent's Amended Answer to Claim Petition.

The petitioner has renounced her Claim Petition by statement and admissions made while proceeding with her aforesaid suit in the Essex County Court, Law Division, and she is now estopped and barred from proceeding on the said Claim Petition because of the position taken by her in the Essex County Court, Law Division, and the Claim Petition should be dismissed.

PUBLIC SERVICE COORDINATED TRANSPORT
(Respondent)

By s/ DAVID M. SELLICK,
Attorney.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.:

C. E. WICKHAM of full age, being duly sworn according to law, on his oath deposes and says: That he is the Agent of the respondent named in the foregoing answer to claim petition; that he has read the same and is familiar with the contents thereof; and that the matters and things therein set forth are true according to the best of his knowledge and belief.

s/ C. E. WICKHAM
(Respondent)

Subscribed and sworn to before me this 11th day of March, 1954, at Newark, New Jersey.

s/ FREDERIC R. REED
Notary Public of New Jersey
My Commission Expires Oct. 26, 1956.

Notice by Respondent of Motion to Dismiss Claim Petition.

(Filed July 14, 1954.)

To: Milton Albert, Esq.,
Attorney for Petitioner,
591 Summit Avenue,
Jersey City 6, New Jersey.

Sir:

TAKE NOTICE that on Wednesday, June 16, 1954, at 10:00 in the forenoon (Eastern Daylight Saving Time) or as soon thereafter as counsel can be heard, I shall make application to the Honorable John C. Wegner, Deputy Director, or such other Deputy Director as may be sitting in the Division of Workmen's Compensation, New Jersey Department of Labor and Industry, in the Court Room at 1060 Broad Street, Newark, New Jersey for a Judgment dismissing the Claim Petition filed in the above entitled case on the following grounds:

(1) Said Claim Petition does not allege an accident arising out of and in the course of decedent's employment, and the Division of Workmen's Compensation has no jurisdiction in the matter.

(2) The petitioner commenced a suit against the respondent in the Essex County Court, Law Division, on or about December 29, 1952, involving the same subject matter set forth in the Claim Petition filed by her in this court. She pursued and pressed said suit in the Essex County Court, Law Division, to final judgment on the merits of the case and said judgment having been entered against her and in favor of the respondent at the conclusion of the trial, on or about March 5, 1954, the subject matter of this suit is now res judicata, and the Claim Petition should be dismissed.

Order by Deputy Director Wegner denying Motion.

(3) The petitioner elected her remedy by commencing, pursuing, and pressing the aforesaid suit, involving the same subject matter to final judgment in the Essex County Court, Law Division, and she is now estopped and barred from proceeding in this Court, and the Claim Petition should be dismissed.

(4) The petitioner has renounced her Claim Petition by statements and admissions made while proceeding with her aforesaid suit in the Essex County Court, Law Division, and she is now estopped and barred from proceeding on the said Claim Petition because of the position taken by her in the Essex County Court, Law Division, and the Claim Petition should be dismissed.

Yours truly,

DAVID M. SELLICK,
Attorney for the Respondent.

Dated: June 7, 1954.

Order by Deputy Director Wegner denying Motion.

(Filed July 26, 1954.)

A dependency petition was filed by the petitioner on May 16, 1952. In said petition it was alleged that "decedent became ill on his tour of duty. He was required and directed to drive his bus in that condition until he could be relieved. The exertion of so driving his bus aggravated his illness and resulted in his death on February 2, 1952 from injury to his heart." The respondent in its answer, denied that the decedent suffered a compensable accident as prescribed by the statute. During the latter part of December, 1952, or the early part of January, 1953, the petitioner started a suit in the Essex County Court, Law

Division, Docket No. 95567 against the Public Service Coordinated Transport, alleging that the Public Service was negligent in that it failed to furnish immediate medical attention after having knowledge of the decedent's condition. The Public Service denied the allegations of the complaint in the law action and pleaded as one of defenses that the plaintiff was barred from pursuing her law action on the ground that she had a dependency petition for compensation pending in the Workmen's Compensation Division. I am informed that testimony was taken in the law action and at the end or during the trial a motion was made by the Public Service to dismiss the complaint on several grounds. The ground that I am concerned is where the argument was advanced that if the plaintiff has a remedy it is in the Workmen's Compensation Division. The Court in that case in disposing of this argument stated "The widow is not without remedy since it has been stated that an action is pending under the Workmen's Compensation Act and its prosecution was being delayed awaiting the outcome of this proceeding." The Court in the law action dismissed the complaint. A motion is now made to dismiss the dependency petition. The first ground given is that the petition does not allege an accident arising out of and in the course of decedent's employment. The requisite as imposed by the statute is that only the substance of the claim be pleaded, including the nature and extent of injury, as far as known to the petitioner. As you said by Mr. Justice Heher in the case of *D'Agostino* vs. *Reliance Picture Frame Co.*, 15 N. J. 537 (1954) on page 542:

> "• • • (2, 3) The Compensation Act embodies a major social policy of placing upon industry the burden of relief to the workman injured by accident in the pursuit of his employment; and society itself also has an interest in the care and welfare of the disabled workman that cannot be set at naught by a

want of technical nicety in the statement of the claim. It is a requisite only that the substance of the claim in the particulars called for by the statute, including the nature and extent of the injury, so far as known to the petitioner, be set down in simple terms, and that there be the procedural fairness and avoidance of the element of surprise basic to due process. * * *"

The facts in the petition as pleaded meets the requirements of the statute.

The next ground for dismissal is that the subject matter is now res judicata. The reason given is that because the petitioner started the law action for the negligence as stated above, the petitioner is now barred in the Compensation Bureau. The next ground for dismissal is that the petitioner made an election of remedies in that she started suit in the law court. The last ground for dismissal is that the petitioner is barred for the reason that counsel in the law action stated "* * * we are confronted with a compensation case in which we could not collect because there is no accident arising out of and in the course of the employment."

As to the first ground, I am of the opinion that doctrine of res adjudicata does not apply to these proceedings. The proceeding in the law action was for negligence in that the respondent failed to provide medical care after having knowledge of the decedent's physical condition. The present petition alleges an accident arising out of and in the course of the employment with respondent. The test of res adjudicata is set forth in the case of *Smith* vs. *Fischer Baking Co.*, 105 N. J. L. 567 (Sup. Ct. 1929). The Court held on pages 568, 569:

"But a matter is not res adjucata unless there be identity of the thing sued for, of the cause of action,

of the persons and parties, of the quality of the persons for and against whom the claim is made, and the judgment in the former suit be so in point as to control the issue in the pending action. To render a prior judgment res adjudicata for the record must show that the issue was taken on the same allegations which are the foundation of the second action. The test is whether the proof which would fully support the one case would have the same affect in tending to maintain the other. *Hoffmener and Sons* vs. *Trost*, 83 N. J. L. 358; *Mershow* vs. *Williams*, 63 Id. 398."

The next ground is that the petitioner made an election to suit in the law court, and therefore is barred in the present suit. There is no merit to this contention. Claimants have only one remedy in cases of injuries by accident arising out of and in the course of employment. The remedy is exclusive for compensation under the terms of the Workmen's Compensation Statute. *Stepnowski* vs. *Specific Pharmaceuticals*, 18 N. J. Super. 495 (App. Div. 1952). See also *Estelle* vs. *Red Bank*, 14 N. J. 256 (1954).

The last ground is that petitioner should be barred in these proceedings because counsel in the law proceeding stated in open court that there was no accident. I am not concerned in these proceedings with the statements of counsel made in the law action. The petitioner is entitled to a full and complete hearing on the merits. *Federal Leather Co.* vs. *DeRenisis*, 113 N. J. L. 235 (Sup. Ct. 1934). Compensation proceeding is a creature of the statute. Comment of counsel cannot deprive the petitioner of her right to a hearing on the petition. The motion is denied.

JOHN C. WEGNER,
Deputy Director.

Dated: July 26, 1954.

Opinion by Deputy Director Lorenz after Reserving Decision.

(Filed August 29, 1955.)

The Deputy Director: This is a proceeding for Workmen's Compensation by the widow, as a full dependent for her late husband, Harry Kream.

Some proceedings had been initiated by the petitioner in the law courts and resulted in a motion in favor of the defendant.

The present proceeding is based upon the Workmen's Compensation Act of this date.

Lengthy arguments preceded my hearing and had ended in a denial of a motion by respondent by an order of the Honorable John C. Wegner, Deputy Director. For that reason, I decline to hear the argument again.

Now, to the merits: The petitioner's decedent was an operator of a bus in the employ of the respondent.

A transcript of the testimony of Edward J. Wayda, a fellow employee and of Fred Ulbrich, the station master at the garage of the Public Service at 19th and 16th Avenue was presented to me in a transcript taken at the time of the court hearing.

On February 2, 1952, the decedent called the station master from Military Park, the eastern end of the bus line, and as it appears on Page 70 of the testimony of Mr. Ulbrich, the decedent said, "Have you got anybody to relieve me? I have chills and I am sweating and I want to get relief and I" (meaning Ulbrich) "told him that he could get relief at 19th Street and 14th Avenue about a mile-and-a-half from where he was calling from."

The deceednt proceeded with his bus, this being shortly before noon on Saturday, through the downtown streets of Newark until he reached 14th Avenue and 19th Streets. This was about 11:55 A. M. Ulbrich had despatched Ed-

ward J. Wayda to meet the bus there. Wayda testified that decedent, Kream, perspired.

There is also testimony, that Kream staggered down the steps of the bus. His face was purple and all sweated up. Wayda suggested that he, Kream, call up the company to drive his car home. Kream refused and proceeded to his car.

Martin Blum testified that he was driving on Hawthorne Avenue, near Leslie Street in Newark, when a car veered and went on the sidewalk into a brick wall. He got out of his car; went to the first car and found Kream on the floor board of his own automobile. He seemed to be moving. The car went through the hedges and struck a retaining wall. Blum tried to give aid when Kream moved and tried to talk, but could not. He passed away in five or six minutes.

Blum states that it was Saturday noon and that the sirens had sounded; that he, Blum was alert more than usual.

I think it is comon knowledge in this City that the war sirens go off at noon on Saturday.

An autopsy was performed and the protocol is in evidence.

The death certificate originally gives the cause of death as "motor vehicle accident, collision of pleasure car and building, driver; occlusive coronary arteriosclerosis; laceration of lip." This was amended to read, as cause of death, "Motor vehicle accident, collision of pleasure car and building, driver; occlusive coronary, arteriosclerosis; laceration of lip; accidental death." Signed, "Doctor Homer D. Schaff".

Nathan Koenigsberg, a bus driver in the employ of the respondent states that he was driving his bus and saw the decedent five or ten minutes after twelve, that he blew his

horn and waved at Koenigsberg and then Koenigsberg tooted his horn. As Koenigsberg was on his way back, he was stopped by the police and identified the decedent.

Henrietta Kream, the widow, testified that she was the sole dependent; that the decedent was never sick and that he did not lose much time with the respondent, except for an occasional afternoon off.

The wages of the decedent, by stipulation, was $78.76, gross.

Doctor Michael Ritota, testified for the petitioner and in answering the hypothetical question, after study of the autopsy protocol, stated that all the pathology lay in the heart of the decedent; that he suffered an acute damaging process. He stated that the chills and fever was the onset of the coronary vascular collapse; that when the car careened before the decedent's death, there was a severe cardiac vascular collapse; that two coronary vessels were occluded and the heart was no longer able to meet the demands from the period of Military Park to the time of death. There was aggravation of the condition by decedent's driving, which was an imposition on the heart; that the act of the driving of the bus from the time Kream called the station master was an imposition on the workload of the heart. The doctor observed: That one with a coronary condition belongs in bed; that it was congestive heart failure, here, due to the occlusion.

Doctor Saul Lieb, internist, testified with the aid of the autopsy protocol that there was a causal relationship between the driving of the bus, the heart condition and the resulting death; that the decedent was ill when he called and had sweating and chills due to the attack of coronary insufficiency because of the occlusive coronary disease; that driving of the bus was inadvisable and aggravated the coronary insufficiency and ultimately contributed to his death.

The doctor further stated that if petitioner had not been driving the bus, he would have survived; that there is no other evidence of any other cause in this case, except the occlusive coronary condition. There was circulatory failure following coronary sclerosis.

Harry Herberman, a trolley starter, 39 years with the respondent, testified that on the day in question, he saw the decedent in the recreation room at the 16th Avenue car house; that the decedent told him he was just relieved and was standing in line to bring in his money, but that the line was too long and he went out. The decedent looked all right to this witness. It was some time later that he heard that Kream died. He states he usually gets there on his day off at 11 or thereabouts, but he did not see Wayda and does not know that Ulbrich sent Wayda to relieve Kream. He was not called to testify in the court trial with Wayda and Ulbrich.

Doctor Jack York, internist, testified for the respondent, with the aid of an autopsy protocol, that in his opinion there was no causal relationship between the work and death; that it was due to a natural progress of chronic progressive obliterative disease; that there was a gradual closure of the blood vessels. He stated that sweating is common in coronary insufficiency, but chills, rare. He further stated that in his opinion, the driving of the bus was no aggravation of petitioner's condition.

Doctor Jerome G. Kaufman, a cardiologist, in answering the hypothetical question with the aid of the death certificate and autopsy protocol, expressed the opinion that there was no relationship between the work decedent was doing and his death; that bus driving had nothing to do with the petitioner's death; that perspiration, in coronary insufficiency is common, but he could not account for the chills; that the petitioner had a coronary insufficiency at Military Park

when he called and that if the decedent had come to him, he would have put him in bed.

Henrietta Kream, in rebuttal, took the stand and testified that the decedent left her home at 9:00 A. M. that day in very good condition, after a good breakfast and in a happy mood.

There is some contradiction in the testimony of Wayda and Ulbrich. Apparently, the statements taken from them in part were later denied, but the substance of the testimony is as I have quoted above.

The testimony of Harry Herberman is interesting. For the first time in the extensive hearings in this case, this witness places the decedent in the Public Service station on 16th Avenue. He did not see Wayda and he not know that Ulbrich sent Wayda to relieve the decedent. No one has been called, other than he, to place the decedent at the Station. I disregard his testimony.

Respondent in its numerous reasons for dismissal, repeatedly urges the inquiry: "Where was the decedent?" It also calls attention to the statement of counsel for the petitioner before the law court, that the petitioner could never prevail in a Workmen's Compensation proceeding.

The record indicates what the doctors had found on autopsy which was performed a few hours after death. The sequence of events was rapid and unbroken; from the time of the call at Military Park, the decedent drove the bus in the noon Saturday rush hour of downtown Newark to the point where Wayda relieved him, in the condition described by Wayda, although he later modified it, the decedent got into his car and drove away some blocks in the City of Newark, until his car struck the retaining wall after he collapsed.

From the time of Wayda's meeting the bus at about 11:55, to the time that witnesses place the decedent in the

car after his collapse, shortly after the sirens blew, was a matter of some 15 to 25 minutes.

It is difficult for me, therefore, to accept the testimony of Herberman with the delay at the Public Service Station.

The testimony tends to indicate that the decedent got into his car and met his death.

The medical testimony, as is usual in these cases, is conflicting, but the substantial fact of the occlusion is accepted by all the doctors, wherein is the accident. The doctors agree, except Doctor York, that the driving of the bus aggravated the condition of the heart.

Doctor Jerome G. Kaufman, however, states that he does not think the driving had anything to do with the decedent's death, but on cross examination, he states that if the decedent had come to him, he would have ordered him to bed, from a patent recognition of the petitioner's condition with the necessary prescription of rest.

Can a statement of counsel of the petitioner in a law court as to inability of the petitioner to prevail in Workmen's Compensation, defeat the statutory right for compensation if it is properly established?

It is my opinion, that such statement by counsel to the law court has no effect upon the validity of the proceeding in the Workmen's Compensation Division.

I am not unmindful of the disposition of an action for negligence in the law court against the respondent on the same facts by this petitioner, in her capacity as Administrator.

Under the law, I am not concerned with what happens in other courts if the claim is valid under the New Jersey Workmen's Compensation Act.

I find, therefore, that in the light of all the testimony before me, the theory presented by the petitioner as to the cause of accidental death of the decedent is the more probable.

Opinion by Deputy Director Lorenz after Reserving Decision.

I find that the petitioner has sustained the burden of proof; that her decedent, Harry Kream had departed this life on February 2, 1952 as a result of an accident which arose out of and in the course of decedent's employment with the respondent, of which personal injuries the respondent had legal notice.

I find that the date is 35 percent of $78.76, or $27.66.

The respondent will pay to the widow, Henrietta Kream, 300 weeks at $27.66, or $8,298, plus $250 funeral expenses.

I allow Doctor Michael C. Ritota, $100, payable, one-half by each party.

I allow Doctor Saul Lieb, $100, payable, one-half by each party.

I allow a counsel fee of $1,500, payable, $800 by the respondent, $700 by the petitioner.

Stenographic fee by the respondent.

Determination, Award and Rule for Judgment, by Deputy Director Lorenz.

(Filed August 29, 1955).

STATEMENT OF AWARD.

Assessed Against Respondent:

Temporary disability	None
Dependents compensation 300 weeks at $25.00 per week	$7,500.00
Funeral bill allowance for burial of petitioner's decedent	$ 250.00
Dr. Michael C. Ritotta, for his appearance and testimony	$ 50.00
Dr. Saul Lieb, for his appearance and testimony	$ 50.00
Unpaid medical bills	None
Milton Albert, Esq. and Aaron Gordon, Esq., petitioner's attorneys, counsel fee	$ 800.00
Stenographic fees	$

Assessed Against Petitioner:

Dr. Michael C. Ritotta, for his examination report, appearance and testimony	$ 50.00
Dr. Saul Lieb, for his examination, report, appearance and testimony	$ 50.00
Milton Albert, Esq. and Aaron Gordon, Esq., petitioner's attorneys, counsel fee	$ 700.00

A formal petition having been duly filed, claiming compensation under Article 2, Chapter Fifteen, Title 34 of the Revised Statutes, its supplements and amendments, an answer having been filed, and the parties having appeared before me, Stephen J. Lorenz, Deputy Director of Work-

Determination, Award and Rule for Judgment, by Deputy Director Lorenz.

men's Compensation, at the Division of Workmen's Compensation, 1060 Broad Street, Newark, N. J., on , and testimony having been presented on the issues involved and stipulations having been entered on the record, I find and determine as follows:

1. The petitioner was in the employ of the respondent on February 2nd, 1952, on which date he sustained personal injury as the result of an accident arising out of and in the course of his employment, from which injuries he died. The accident and injury occurred as follows: Decedent while driving his bus suffered injuries to his heart which brought about his death.
2. The respondent had due and timely notice and actual knowledge thereof.
3. There were no medical bills for medical treatment because of the death of the petitioner's decedent, Harry Kream, on the date of the accident, February 2nd, 1952.
4. Petitioner's wages were $78.76 per week, making the compensation rate $25.00 per week.
5. Compensation shall be paid by the respondent under said statute.
6. Payments shall be made as set forth in STATEMENT OF AWARD.

At the conclusion of the trial I reserved decision and thereafter I made certain observations and findings which were recorded and which are made a part hereof as if set fully herein.

Pursuant to such findings, judgment is entered in accordance with the above STATEMENT OF AWARD.

Determination, Award and Rule for Judgment, by Deputy Director Lorenz.

Pursuant to the provisions of section 34:15-64, as amended, it is directed that amounts to be deducted for the petitioner's expenses are to be paid to the persons entitled to the same, the remainder to be paid directly to the petitioner.

STEPHEN J. LORENZ,
Deputy Director of Workmen's Compensation.

Dated: August 12, 1955.

Letter of Attorney Milton Albert dated April 9, 1953.

(Filed October 20, 1955.)

April 9th, 1953.

Clerk,
Compensation Court,
1060 Broad St.,
Newark, N. J.

Henrietta Kream, vs. Public Service
Coordinated Transport, etc.

Dear Sir:

Will you be so kind as to mark the above matter, which is No. 2 on your calendar for April 15th, 1953, "adjourned" for an indefinite time in view of the fact that there is a third party action pending in the Essex County Court by the same parties, and in order to expedite the handling of the matter efficaciously, I believe that it will be to the advantage of all concerned that the third party suit be tried first, so that perhaps we will not have to proceed with the Compensation matter at all.

Very truly yours,

Milton Albert

M:McG

Copy to Public Service Coordinated
Attn: Mr. Reed

Formal Hearing Record.

(Filed October 20, 1955.)

Date for Pretrial Conference	Trial Date	Adj. by Petr.	Adj. by Resp.
7-23-52			
9-10-52			
Assigned to Mr. Wegner			
	10- 1 -52	x	
	10-15-52	x	
	4- 5 -53	x	
	10- 7 -53	x	
	11-14-53	x	
	12-16-53	x	
	2- 3 -54	x	
	3-17-55		x
	4- 7 -54	x	
	6- 2 -54	x	

6-16-54 Conference Adj. to
6-30-54 Listed for Motion. P. A. did not appear. Adj.
7- 7 -54 Hearing on Motion. Reserved Decision.
10-13-54 Conference. Case to be put on Rover List.

2-8-55 Returned to Assignment Bureau.

3-2-55 Assigned to Stephen J. Lorenz. Adjourned to

3-16-55 Partial hearing. Adj.
4-27-55 Partial hearing. Adj.
5- 2 -55 Hearing. Reserved Decision.
8- 3 -55 Dictated Opinion. Award.

Notice of Appeal.

(Filed September 23, 1955.)

To: Milton Albert, Esq.,

Attorney for Petitioner-Appellee,
591 Summit Avenue,
Jersey City 6, New Jersey.

Hon. Daniel A. Spair, Secretary,
Division of Workman's Compensation,
New Jersey Department of Labor and Industry,
29 East Front Street,
Trenton 8, New Jersey.

Hon. Russell C. Gates, Clerk,
Essex County Court, Law Division,
Court House;
Newark, New Jersey.

Sirs:

TAKE NOTICE that the respondent-appellant, Public Service Coordinated Transport, hereby appeals to the Essex County Court, Law Division, from the judgment entered in the Division of Workmen's Compensation, New Jersey Department of Labor and Industry, in favor of the petitioner-appellee, Henrietta Kream, said judgment being set forth in a Determination, Award and Rule for Judgment signed by Deputy Director Stephen J. Lorenz, dated August 12, 1955,

DAVID M. SELLICK,
Attorney for Respondent-Appellant.

Dated: September 8, 1955.

Preliminary Oral Decision by County Court at Conclusion of Oral Argument.

(Filed May 3, 1956.)

The Court: I will inform you to this extent that I feel satisfied that the petitioner was not and is not barred by reason of the doctrine of election of remedies, by reason of the doctrine of intervention and multiplicity or by reason of the doctrine of res judicata. I am also satisfied that from the telephone call and the knowledge obtained shortly after his death thereafter satisfies the statutory requirement of notice or knowledge.

The case narrows down to the question of whether or not the continuous driving of the bus after the onset of the attack under the circumstances here constitutes an unusual strain. There is sufficient evidence in the record to justify the conclusion that the subsequent driving of the bus was the precipitating factor and did aggravate the condition, and the medical testimony supports that conclusion, but whether or not that constitutes an unusual strain within the purview of our definition of that term or those terms to me is the final problem.

I am going to give it a little more consideration. If you have any cases send me the references by letter and mail your adversary a copy of the letter.

Oral Decision—Findings by County Court.

(Filed April 5, 1956.)

SPEAKMAN, *A. J. S. C.*

This is an appeal from the determination of the Division of Workmen's Compensation awarding the petitioner compensation under the death provision of the Workmen's Compensation Act. The amount of the decedent's earnings, dependency, etc., and the applicable rate were stipulated and are not in issue here.

A brief recital of the factual background will help in the determination of the matter. On February 2, 1952 decedent, who was then 51 years of age, died of what is commonly called a heart attack and described in the autopsy report as occlusive coronary arteriosclerosis. At about nine o'clock that morning decedent finished his breakfast and left for work as a bus driver for the respondent for whom he had been working for a number of years, apparently in good health and happy. He performed his usual duties as a bus driver, and at about 11 or 11:30 when the bus got to the terminus at Military Park he felt ill. Just when he started to feel ill is not clear in the record, but it was shortly before he reached that point. At any event, when he got out of his bus he telephoned his superior, Mr. Ulbrich, who was stationed at 20th Street and 16th Avenue, which is one of the respondent's garages, telling him that he was ill; that he wanted to be relieved; that he was sweating and had chills, and Mr. Ulbrich told him he would get relief at 19th Street and 14th Avenue. Decedent thereupon resumed driving the bus and was relieved by another fellow employee by the name of Wayda when he arrived at that point of 19th Street and 14th Avenue. At that time his condition was described as sweaty with chills. He apparently struggled out of the bus, and it was suggested that someone take him home but he said he would drive home. En route he had the final attack which caused him to drive

off the highway and strike a pole. This attack caused his death. The autopsy report indicates that he died from coronary occlusion.

Thereafter petitioner's widow instituted the action in the Division of Workmen's Compensation seeking compensation. While the matter was there pending she instituted an action in the Essex County Court, Law Division, and requested that the compensation matter be held pending disposition of the law action. The theory in the law action was that the respondent, knowing of his illness, failed to provide medical treatment under the so-called humane treatment doctrine, Szabo *v.* Pennsylvania Railroad Company, 132 N. J. L. 331 (E. & A. 1944).

At the trial of the law action the trial judge directed the entry of judgment in favor of the defendant on the ground that the plaintiff had failed to present sufficient evidence to go to the jury on the question of the employer's failure to supply the medical treatment necessary to sustain that cause of action.

Thereafter there was an amendment to the pleadings in the Division in which the respondent then set up the defenses of election of remedies and *res judicata*. The matter proceeded to final hearing there and Deputy Director Lorenz on August 3, 1955 rendered his opinion awarding the petitioner compensation upon which findings of fact and conclusions of law were subsequently entered. It is from the latter determination or judgment that the present appeal was taken.

Before proceeding to the merits, four preliminary matters were disposed of at the conclusion of oral argument. I will repeat them here. Respondent in the Division and on this appeal as the appellant argues: one, that the petitioner, having proceeded to a determination of the common law action, is barred under the doctrine of election of remedies; two, that she is barred under the doctrine of *res*

judicata; three, there is presented the question of multiplicity of suits, and to prevent a multiplicity of suits the doctrine of election of remedies should be applied; and, four, that there was not the notice required to be given to the respondent as required under the statute.

At that time I overruled all those contentions and then held—and I repeat now my view—that the doctrine of election of remedies has no application here, either for proceeding in one court rather than another, or under the theory of preventing multiplicity of actions. In my view the doctrine of res judicata has no application here. The common law action and the basis of it is entirely different from the basis of the action under the Workmen's Compensation law, as I understand it, and what she or her counsel said during the course of that trial is not res judicata in this action. I am also satisfied that the fact that the decedent telephoned when he got to the Military Park terminus stating that he was ill, plus the subsequent knowledge of his death within an hour after it occurred, constitutes notice in the statutory sense. As I previously mentioned, I find these defenses to be without merit.

At that time I left open the question of whether or not the evidence here satisfied our requirements that the death from a heart attack, in common parlance, was from an unusual strain, exertion, event or happening incidental to but beyond the mere regular employment to constitute proof of accident within the meaning of our cases. No useful purpose would be served in citing the numerous authorities on this point. It is sufficient merely to refer to a few: Lohndorf *v.* Peper Bros., etc., 134 N. J. L. 156 (Sup. Ct. 1946), aff'd 135 N. J. L. 352 (E. & A. 1947); Becker *v.* Union City, 17 N. J. Super. 217 (App. Div. 1952); Snoden *v.* Watchung Borough, 29 N. J. Super. 41 (App. Div. 1953), aff'd per curiam 15 N. J. 376 954); Mergel *v.* N. J. Conveyors Corp., 14 N. J. 609 (1954), and a host of cases on the gen-

eral proposition can be found in one or more of the cited cases.

From the evidence here it seems to be undisputed that shortly before decedent's bus reached the terminus at Military Park he suffered what was the beginning of a coronary attack or heart attack or what has been described as coronary insufficiency. It is not contended, as I understand it, that up until that time he had done anything unusual or in any different manner or under different circumstances to constitute an accident by unusual strain or exertion within the meaning of our rule. It is contended, however, that his continuing to drive the bus thereafter for a distance of a mile or a mile and a half after notifying his superior that he was ill does constitute such an unusual strain, exertion, or event as to bring his subsequent death within the meaning of our cases. The test appears to be whether upon a consideration of all the evidence the greater weight of the reasonable probabilities produces the conviction that there was a proximate and efficient causal relation between decedent's pursuit of his employment and the unexpected and undesigned attack resulting in his death. See Snoden *v.* Watchung Borough, supra, or to state the test another way, from all the facts, together with the medical proof, can it be said that decedent's death from the coronary incident would not have happened but for his employment? See language of Justice Oliphant in Lohndorf *v.* Peper Bros., supra. See also the language of the Court in Mergel *v.* N. J. Conveyors Corp., supra.

Applying this test to the facts we have the following situation: that when the decedent got out of his bus at the Military Park terminus and telephoned his superior he was at that time experiencing coronary insufficiency. The medical evidence is conflicting as to whether the events from that time on contributed to his death an hour or so later or whether it was the natural progress of the disease, but, in

the view I take of the evidence, the more reasonable probability is that had he not continued driving the bus he probably would not have suffered death at the time he did. The exertion and emotional and nervous strain he experienced thereafter driving the bus through the city streets of Newark for a mile and a half under that unusual condition of having the commencement or beginning of a coronary attack seems to me to constitute the ususual event or strain to satisfy the requirements of our rule. There is ample evidence in the form of expert testimony in the record to sustain the hypothesis that but for his continued employment, that is, for his continued driving of the bus after advising his superior that he was ill and not being relieved, he wouldn't have died at the time he did. It is not necessary that it be found that he certainly would have lived. It is only necessary under our cases to find that it was a reasonable probability that he would not have died when he did but for the continued driving.

Where, as here, an employer through its proper superior officer has knowledge that an employee is ill and he does not then relieve the employee of his duties, even though he does not expressly direct him to continue with them, the fact that the employee in furtherance of his employer's business continues to perform these duties in that condition seems to me to constitute the unusual event or exertion. From what I have said it follows that decedent suffered an accident within the meaning of the rule laid down in the cases previously cited, and that the petitioner is entitled to recover compensation in the amount stipulated.

The judgment of the Division of Workmen's Compensation is accordingly affirmed.

Order for Judgment by County Court.

(Filed April 30, 1956.)

Respondent-appellant having appealed to this court from a Determination, Award and Rule for Judgment of the Division of Workmen's Compensation of the New Jersey Department of Labor and Industry, which judgment and award was made on August 12, 1955, for dependent's compensation to the petitioner-appellee for the death of her decedent as the result of an accident arising out of and in the course of the decedent's employment with the respondent-appellant on February 2, 1952; and the court having considered the transcript of the testimony and the record below, the briefs of the respective parties herein, and the oral argument of the respective parties herein, and having determined that the said judgment and award of the Division of Workmen's Compensation should be affirmed for the reasons stated orally on February 23rd, 1956, and the parties now appearing before the court for the settlement of the terms of the judgment of affirmance;

It is, on this 30th day of April, 1956,

ORDERED, that the judgment and award of the Division of Workmen's Compensation of the New Jersey Department of Labor and Industry made in favor of the petitioner-appellee and against the respondent-appellant on August 12, 1955 is herein affirmed in all things, for the reasons stated orally on February 23, 1956, which opinion is herein incorporated by reference as though fully set forth, and it is,

FURTHER ORDERED that judgment is entered in favor of the petitioner-appellee and against the respondent-appellant as follows:

Order for Judgment by County Court.

STATEMENT OF AWARD.

ASSESSED AGAINST RESPONDENT:

Temporary disability	None
Dependents compensation 300 weeks at $25.00 per week	$7,500.00
Funeral bill allowance for burial of petitioner's decedent	$ 250.00
Dr. Michael C. Ritotta, for his appearance and testimony	$ 50.00
Dr. Saul Lieb, for his appearance and testimony	$ 50.00
Unpaid medical bills	None
Milton Albert, Esq., and Aaron Gordon, Esq., petitioner's attorneys, counsel fee	$ 800.00
Stenographic fees	$

ASSESSED AGAINST PETITIONER:

Dr. Michael C. Ritota, for his examination, report, appearance and testimony	$ 50.00
Dr. Saul Lieb, for his examination, report, appearance and testimony	$ 50.00
Milton Albert, Esq., and Aaron Gordon, Esq., petitioner's attorneys, counsel fee	$ 700.00

and it is,

FURTHER ORDERED, that Milton Albert Esq. and Aaron Gordon, Esq., attorneys for petitioner-appellee on this appeal are hereby awarded a counsel fee in the sum of $1,500.00, of which $800.00 is to be paid by the respondent, and $700.00 is to be paid by the petitioner, and judgment is hereby entered for said counsel fees.

G. DIXON SPEAKMAN,
A. J. S. C.

Notice of Appeal.

(Filed May 29, 1956.)

To: Hon. G. Dixon Speakman, A. J. S. C.,
Sitting in the Essex County Court,
Court House, Newark, New Jersey.

Milton Albert, Esq.,
Attorney for Petitioner-Appellee,
591 Summit Avenue,
Jersey City 6, New Jersey.

Sirs:

NOTICE is hereby given that the respondent, Public Service Coordinated Transport, appeals to the Superior Court of New Jersey, Appellate Division, from the final judgment of the Essex County Court, Law Division, and every part thereof, entered in favor of the petitioner, Henrietta Kream, in this action on April 30, 1956.

DAVID M. SELLICK,
Attorney for Respondent-Appellant.

Dated: May 14, 1956.

Testimony.

July 14, 1954.

Before:

HONORABLE JOHN C. WEGNER,
Deputy Director.

Appearances:

MILTON ALBERT, ESQ.,
By: AARON GORDON, ESQ.,
For the Petitioner.

DAVID M. SELLICK, ESQ.,
For the Respondent.

(2) Mr. Sellick: If the Court please, we are here today on the Respondent's motion to dismiss the claim petition in this case on the grounds set forth in a Notice of Motion which was served on Mr. Albert, the attorney of record for the Petitioner, on the eighth day of June, 1954. I would state that the motion was originally set down for June 16, but it has been adjourned several times. I offer the notice in evidence.

Mr. Gordon: I don't think the notice has to be offered in evidence. It is a matter of record, if your Honor please. I mean it has only whatever efficacy any filed paper in the Division would have.

Mr. Sellick: I filed with the Court a copy, and the Court has it. If you want me to repeat each one of my grounds, I could do so, but I thought I would save time. This notice has the argument by Mr. Albert on it, and I don't want to read each one of them.

Mr. Gordon: I say again you don't have to read each one. If it is a filed paper, and undoubtedly it is, we will concede it was properly served on us, that it was properly filed, (3) and your Honor has a copy of it. That, I think, is enough.

Offering of Exhibits and Objections Thereto.

Mr. Sellick: All right, I will now file with the Court the original. The Court merely has a copy.

Mr. Gordon: There is no objection, and I concede it is properly done.

(Mr. Sellick hands paper to the Deputy Director.)

The Deputy Director: Let's proceed.

Mr. Sellick: If your Honor please, a claim petition was filed in this case on May 16, 1952, over two years ago, alleging in Paragraph 17, that on February 2nd, 1952, "the decedent became ill on his tour of duty. He was required and directed to drive his bus in that condition until he could be relieved. The exertion of so driving his bus aggravated his illness and resulted in his death on February 2nd, 1952, from injury to his heart." That is the alleged accident which we are here on today. An answer was then duly filed at Tronton, in which the Respondent denied the accident and causal relationship.

The case was first listed for trial in (4) your Honor's court on October 15, 1952, when Mr. Gordon and I appeared before your Honor on his request that the case be marked not moved. Mr. Gordon informs me, though, he intends to question me on that. I made a note at that time, however, and my notes indicate we were here for the purpose of him having the case marked not moved. He can deny it when he replies. I informed the Court at that time that I had no way of making the Petitioner proceed with the claim if she didn't want to at that time, but I was not consenting to the case being marked not moved, and my reason for that was if I consented to it being marked not moved I would probably be estopped from serving a 30 day notice for want of prosecution. The Court at that time stated—I am going by my notes and memory—that it was not your practice to mark a case not moved but to give the Petitioner a long adjournment because they intended to file an upper court action in this case.

Offering of Exhibits and Objections Thereto.

I later received a letter addressed to the Court dated April 9, 1953, requesting that the case, which was listed No. 2 on the calendar (5) for April 15, 1953, be adjourned for an indefinite time in view of an impending third party action. In this letter it was stated, and the Court has the letter in its file, and I would like to quote from it because I think it is important in this case. The letter was signed by Mr. Albert, addressed to the Court, and states, "I believe that it will be to the advantage of all concerned that the third party suit be tried first so that perhaps we will not have to proceed with the compensation matter at all." Now, your Honor, if that means anything at all it means that if they happen to win the upper court suit this Court can treat this case as res judicata, an election of remedies, or anything at all—they don't care—if they win the other case. This case, your Honor, I contend has been held over our heads pending the decision of the upper court case.

We then received a copy of a letter from the Court dated April 10, 1953, stating that no adjournment would be granted. Later, on April 14, 1953, Mr. Albert called us stating he had been in touch with your Honor and he was granted an adjournment.

(6) I have some notes here on the various adjournments, and to save time I will read them off. They all were requested by the Petitioner with the exception of one, which I will state. The case was on your trial list, No. 3, on October 7, 1953. The Petitioner requested an adjournment, and your Honor granted it to him. It was set down again later in October, and your Honor granted an adjournment. It was No. 4 on the trial list on December 16, 1953, and another adjournment was granted at their request. Then it was down as No. 3 for trial February 3, 1954, and your Honor adjourned it at their request.

Offering of Exhibits and Objections Thereto.

Now, the upper court action filed came to trial and judgment was entered in the upper court action, and on March 5, 1954, I then filed an amended answer setting up additional facts, which are practically a reiteration of the grounds of my motion today. Because of that judgment, on March 11, 1954, I wrote a letter to the Court requesting an adjournment so that I could get some records from the Court to substantiate the grounds of my motion and to have those records available. That is the first and (7) only adjournment I requested in this case. Your Honor adjourned it at that time to April 7, 1954. It couldn't be tried that day because my opponent informed the Court that he intended to appeal the judgment in the Essex County Court. It has been carried, as your Honor knows, since then.

To sum up, the case has been carried and adjourned in the Compensation Court for a period of about 20 months, and the Petitioner's frequent requests for adjournments, including the statement in the April 9, 1953, letter, which is in the Court's record, indicates that this case was nothing more-or-less than as I stated before, a club to make us pay in the other case. And it was even implied by the Petitioner that if he won the other case that this case could be thrown out on any ground, he wouldn't be interested in it and I say res judicata, election of remedies, and anything else doesn't depend on success in the other court. It depends on the subject matter of the case.

Now, despite what happened in the other court the Petitioner wants this court to spend (8) its time trying the same issue all over again, and I say there is no necessity for our courts to do that, and our cases hold that this Court need not do that.

Now, as to some factual information as was alleged tried and stated in the Essex County Court. I offer in evidence a copy of the complaint which was issued in the case

of Henrietta Kream *vs.* Public Service Coordinated Transport in the Essex County Court on December 29, 1952.

Mr. Gordon: I object to the complaint being marked in evidence because I contend it is entirely immaterial and incompetent. And while I'm on my feet I must say something about and answer the argument on res judicata. I must say that when counsel urges res judicata, he is entirely mistaken as to the principle involved in res judicata. You only have res judicata, your Honor, where you have a unity of parties in both actions. That we have. Where you have a unity of action, that we have not. The common law suit was a negligence case. This is a compensation case. Therefore in my humble opinion it is entirely immaterial and incompetent to offer in evidence the complaint, (9) or mark in evidence the complaint filed in a common law suit of negligence, even though it is between the same parties. Negligence has no basis in a compensation case. Specifically by statute, the Workmen's Compensation Act states that negligence is no longer an element which must be proven, or contributory negligence is no longer an element which must be proven in a Workmen's Compensation case.

The Deputy Director: I will allow it.

(The complaint referred to was received in evidence and marked R-1 as of this date.)

Mr. Sellick: Now, I would like to call your Honor's attention to Paragraph 2 of that complaint. I would like to call your Honor's attention also to the fact that this particular complaint was not issued until two months after your Honor granted the October 15, 1952 adjournment. I really want to read it because I want to show the similarity of the factual allegations as to what was alleged in the pleadings before your Honor in the compensation case.

Offering of Exhibits and Objections Thereto.

The Deputy Director: How long will this motion take? I have two witnesses in another case, and we close at 2:00 o'clock to-day. (10) I have two witnesses here on a case that I have to take. They are from out-of-town.

Mr. Gordon: The complaint speaks for itself.

The Deputy Director: How long will this motion take?

Mr. Gordon: I won't take more than ten minutes to answer my adversary.

Mr. Sellick: Well, your Honor, is this off the record?

The Deputy Director: Off the record.

(Discussion off the record between Court and counsel.)

Mr. Sellick: All right, then, if your Honor please, that is all on that.

Also on the same basis I offer in evidence the answer of the defendant Public Service Coordinated Transport which was filed in the upper court action.

Mr. Gordon: The same objection as to the complaint.

The Deputy Director: I will allow it.

(The answer referred to was received in evidence and marked R-2 as of this date.)

Mr. Sellick: In that same particular action (11) there was an Interrogatory served, and I have the sworn answers to the Interrogatories by Henrietta Kream, sworn to before Milton Albert, attorney-at-law of New Jersey on March 5, 1953. There are two particular Interrogatories which I would like to read into the record.

Interrogatory No. 9: "Explain more fully and in detail how the alleged accident occurred in which the decedent was injured and from which he subsequently died, as alleged in the complaint.

"Answer: Plaintiff refers the defendant to the complaint for answer to this question.

Offering of Exhibits and Objections Thereto.

No. 11 of the same sworn Interrogatory reads as follows: "Paragraph Five of the complaint alleges among other things that the stricken condition of the Plaintiff's intestate was made known to the defendant corporation through its agents, servants and employees."

Sub section A: "State specifically when, to whom and in what manner such alleged notice was conveyed to the defendant through its agents, servants and employees?"

"Answer: Decedent notified Mr. Fred Ulbrich, the defendant's Station Master by telephone on February 2nd, 1952, that he was (12) very ill, and requested Mr. Ulbrich to have someone relieve him at Military Park, Newark, where the bus decedent was operating, was stationed."

There is a Sub section B and C, but I don't think it makes any difference.

The same case was pre-tried in the Essex County Law Court before Judge William A. Smith, and I offer in evidence a certified copy of the pre-trial order.

Mr. Gordon: The same objection as to the complaint and the answer.

The Deputy Director: I will allow it.

(The pre-trial order referred to was received in evidence and marked R-3.)

Mr. Sellick: As a result of the trial in the Essex County Court, judgment was entered in that particular case. I offer in evidence a certified copy of the judgment covering the result of the case.

Mr. Gordon: I have no objection to that being marked.

The Deputy Director: Mark it.

(The certified copy of the judgment referred to was received in evidence and marked R-4.)

(13) Now, at the trial in the upper court there was a motion made at the end of the Plaintiff's case to dismiss

it on several grounds. I have obtained from the court stenographer, with his certificate attached, the argument by Mr. Gordon and Mr. Wille, the defendant's attorney in this case, and statements of the judge which I offer in evidence.

Mr. Gordon: I object to that on several grounds. In the first place, the entire argument is not contained in that record, and I might say to your Honor that the argument on the motion for judgment made by the defendant in that common law suit consumed a period of three and one-half hours, and at the conclusion of the argument the Court indicated that it would let the case go to the jury; and that was at 4:00 o'clock in the afternoon. The next morning, having slept on it, we came in ready to sum up to the jury, and I was told he had changed his mind and that he was going to set aside his ruling on both the motion at the end of the Plaintiff's case and on motion at the end of the Defendant's case, and that he rendered his judgment.

(14) Now, I know that counsel is going to argue that I made statements on a legal argument in opposition to a motion to dismiss. He has indicated to me that the purpose of his offering of this evidence is that what I said there is an admission against my client's right. I can't see for the life of me how an argument made by a lawyer on a question of law, no matter how strong the argument might be, would negate the right of a compensation division, such as this one, to pass upon whether or not the injury met with by the decedent during his employment was compensable. And I might say very frankly that since I argued that motion, and apparently the county court paid no attention to my argument, because it said we had a remedy in Workmen's Compensation, I have since changed my mind. I think nobody can hold against a lawyer and charge his client so as to defeat his client's right to a recovery in compensation, an argument, shall we call it, on a mistaken thought with regard to the law. Therefore, I say that which is now offered in evidence is objected to, and I ask

your Honor to refuse to mark it in evidence for that reason. It is incompetent.

Mr. Sellick: Your Honor please, Mr. Gordon, (15) after having this case in his office for about two years, and having a chance to study the law, having heard the witnesses testify under oath, made certain statements in the county court. Now, he wasn't giving the Court any curbstone opinion when he solemnly told that Court certain things, when he solemnly told that Court that this Compensation Bureau had no jurisdiction, and I therefore state the position he took in that case is evidential in this case.

A recent case came down on the effect of statements made in judicial cases. In the case of Trenton Oil Co., *v.* Dries, 30 N. J. 122 Super. an opinion by Judge Wood, he quotes on the effect of estoppel as a result of things done in judicial proceedings. I could give this to your Honor and have your Honor read it, or I can read it for the record (referring to papers).

The Deputy Director: I can read it.

Mr. Sellick: I contend when Mr. Gordon solemnly made statements to the Court, factual statements, after having a chance to study the case and the law in the case, it makes this evidential.

(16) The Deputy Director: I will allow it.

Mr. Sellick: The transcript is offered.

(The transcript referred to was received in evidence and marked R-5 as of this date.)

Mr. Sellick: Also, if your Honor please, I offer in evidence the transcript of the oral decision by Judge Cafiero in the other case, with the court stenographer's certificate attached.

Mr. Gordon: I have no objection to that.

The Deputy Director: Mark it.

(The papers referred to were received in evidence and marked R-6 as of this date.)

Argument on Question of Estoppel.

Mr. Sellick: Now, if your Honor please, on the question of estoppel, we are told in the case of New Jersey Suburban Water Co. *v.* Harrison, 122 N. J. L. 189, that an estoppel arises where one is concluded and forbidden by law to speak against his own act or deed; even if it be to say the truth.

Off the record.

(Discussion off the record between Court and counsel.)

Mr. Sellick: Now, on the record, if your Honor please. (17) I would like to cite some cases.

In the case of in re Opper, 29 N. J. Super. 520, it was held —

The Deputy Director: What is the citation?

Mr. Sellick: In re Opper.

The Deputy Director: I mean——

Mr. Sellick: 29 N. J. Super. 520. It was held one of the major objectives of the new constitution was to permit, in fact to require where possible, the complete determination of a controversy between the parties by the Court which first properly obtained jurisdiction over the subject matter.

In the case of Smith *v.* National Commercial Title Co. 120 N. J. L. 75, it was held, "Waiver is a designation of the act, or of consequences of the act, of one side only." And it refers to an intentional abandonment or relinquishment of a known right.

There is a very recent case on estoppel by our Supreme Court—Ajamian *v.* Schlanger, 14 N. J. 483. In that case the Court held where there was a new suit for damages after a suit for rescission had been held, "To tolerate (18) his pressing—" Well, I will save time as the Court has the quotation.

Argument on Question of Estoppel.

On the matter of res judicata, your Honor, just for a citation I would like to call your Honor's attention to two cases.

Also, your Honor, there is a very recent case by Judge Duffy, Pagan *v.* Kaufman, 22 N. J. Super. 425, and I think if your Honor will glance at that you will notice there is quite a similarity between that case and our case. In that case, it is just the reverse of ours, the compensation case was tried first, and they attempted to try the law case on the same set of facts, and Judge Duffy wouldn't allow it to be done.

I think it illustrates the point at issue, that you cannot take one set of facts, and when your Honor looks over the sworn allegations and testimony, you will find that the factual situation is the same, you cannot take it in one court and say it is one thing, and say it is another in another court.

Your Honor, I know, has no desire to sit in an appellate capacity over what happened in the County Court. If they feel that the County (19) Court reached a wrong decision on the facts, they should take an appeal in the proper way. What they are asking you to do in this case—they tried the case and they lost—they come here with the same set of facts and ask your Honor to act as an appellate court on something that has been decided in the upper court. And I say it isn't the proper procedure.

I have some more cases, cases on election, but I think if your Honor will go over the facts and the statements made, and what happened, you will agree that your Honor has no desire to try over the factual situation which has been tried and decided in the upper court.

I contend that the matter is res judicata because of what happened in the other court. I contend that the Petitioner has renounced and waived any particular right to try this case in this court. I contend that he is estopped

by a recent decision on the subject matter of this suit, and I therefore respectfully move that the case be dismissed.

Mr. Gordon: Now, if your Honor please, this motion, as far as my memory goes back, is probably something which has never before been (20) undertaken by a Respondent in a Workmen's Compensation case. It is most unusual. We did file a compensation claim petition and we alleged an accident. I don't want to belabor the situation by reading the allegation in the claim petition. It was read by my adversary. They filed an answer. The matter was listed before you, and while it was listed before you I decided, upon a full investigation of the case, that we had a good case here under the humane doctrine enunciated by the Court of Errors and Appeal in Szabo *v.* Pennsylvania Railroad; namely, that an employer receiving notice of the workingman being stricken not only didn't furnish him with medical assistance immediately but made him drive a bus two miles in heavy traffic through the City of Newark to a point where they sent a relief man, and by that time he was in extremis. They let him drive home, and within a few minutes that he was relieved and he was driving home he died of a heart attack.

The fact that we had a pretty good case in negligence for failure to furnish medical attention was recognized by the trial judge in Essex County, who, when my case went in, said, "Don't (21) even answer counsel's motion, I am going to deny the motion for a dismissal." And after that, and despite medical testimony of the very finest, with an autopsy and everything, showing how the driver of this bus after he had been stricken at Military Park, the driving of this bus for two miles brought about this massive myocardial infarction. As I recall it, the Public Service rested without putting in any testimony, and again made a motion to dismiss, and during the course of that motion to dismiss they argued that it should be dismissed because we

had made an election of remedies by proceeding to file a claim petition for compensation, a position, if your Honor please, which they maintained in their answer in the upper court suit in which they said that we had elected to pursue the remedy in Workmen's Compensation and were barred from proceeding in the upper court. And they indicated the suit was still open down here in the Compensation Division and not disposed of. That was the position which they further maintained on the pre-trial order when they said as a defense that there was an election of remedies by reason of the institution of a Workmen's (22) Compensation action.

In the course of that argument which lasted from 1:30 in the afternoon until 4:00 o'clock, Mr. Wille, the attorney for the Public Service in that suit said, "They haven't any business here, they belong in Compensation if they can establish a case on the merits." That argument is as binding upon the Public Service that we have a Workmen's Compensation case as my argument that I didn't have a Workmen's Compensation case that would succeed on the merits. In other words, the position that I take is this: That no attorney, whether he represents a petitioner or a respondent, can set himself up as a deputy director of Workmen's Compensation and say it is either a case in Workmen's Compensation or it isn't a case in Workmen's Compensation, because in the last analysis the deputy director is the one who hears and determines the facts. And the statements are not the kind of admissions that are binding, as my adversary argues, as in the Trenton Oil Company case *v.* Dries, because in that Trenton Oil Company case they had stipulated and agreed in the course of the judicial proceedings to certain situations (23) and that they were estopped in another action from taking positions inconsistent with the written stipulations and agreements in the absence of fraud or mistake.

Argument on Question of Estoppel.

The law, as I understand it in Compensation, is that if I were to enter into an agreement on behalf of the Petitioner, or I would have the Petitioner enter into an agreement with the Respondent that he had no compensable case, that agreement wouldn't be worth the paper it was written on, or the words that were uttered because it has been held time and time again—and this is one of the potent answers I think to their argument—that no one can bargain away the right, not even the Petitioner himself, to receive compensation in the proper amount and for the proper period as the statute sets up and as the statute may find. So that I can't see how it can be argued that a statement made by me in the course of a legal argument in opposition to dismiss an action in another court can be taken as an admission against my client which would estop her from proceeding with this claim petition for dependency compensation for the death of her husband; anymore than the Public (24) Service lawyer's admission that, "This is a Compensation case and Mrs. Kream belongs in the Compensation Division," can be taken.

Now, what did Judge Cafiero do? You have the exhibit offered. I didn't object to this one because I wanted to make use of it. On Page 6 of the Opinion of Judge Caflero—I might say at the end of the day after that three and one half hour argument, the Judge said we should prepare to sum up to the jury, and prepare any request to charge that either side would have, but to come in at eleven o'clock in the morning instead of ten o'clock because the next day was a Friday and he wanted to dispose of one or two motions that he had, it being a regular motion day. We came in at eleven o'clock in the morning, and I was then advised that overnight the Judge had changed his mind and had decided to set aside the decision he had made on both motions and to take the case from the jury. And in the course of that discussion, on Page 6, the Judge rendered this de-

cision—Page 6 of Judge Cafiero's Opinion or Oral Decision, which is an exhibit offered by the Respondent, he says this: "There being no proof that (25) the death of the decedent was caused by any action of the employer which had been negligently performed the motion for judgment in favor of the Defendant is hereby granted. The widow is not without remedy since it has been stated that an action is pending under the Workmen's Compensation Act and its prosecution was being delayed waiting the outcome of this proceeding." And then I was later told, and I am gratified even in defeat for the few nice words, that I had tried a very good case. It was a letdown with a little cushion to it, but not much of a cushion.

Now we come to the point that this was res judicata. What did the decision say? The decision didn't say that we had no compensation claim. The decision said to the contrary, that we were not without remedy, that we did have a Workmen's Compensation claim. All the decision said was that we had not proven that the death of decedent was due to any negligence or any active negligence on the part of the employer. That is all it said. As I indicated to your Honor, res judicata is a principle which is applied only where there is a unity of parties, we have that; (26) a unity of subject matter, which we don't have; because the subject matter in the upper court was negligence, and down here it is compensation, where negligence plays no part. And the very decision itself, and the order based on the decision, indicates that what the Judge up there decided, and that was the only thing he could decide, was that there was no proof of negligence, and that we were not without remedy because we had a Workmen's Compensation proceeding.

Now, I haven't prepared any cases or any memorandum, because I didn't have the benefit of anything that my adversary would submit, and I should think he would

have submitted his cases to me so that I could answer, but I think I have answered sufficiently. I think he will agree that on res judicata the argument must fall because it is not res judicata of our right to proceed in Compensation. And that is supported not only by their answer in which they said we had a Compensation case, not only by the pre-trial order in which they said the same thing, but by the argument upon that motion where I am accused of making the so-called admissions, the (27) argument of their counsel who said, "He belongs in Compensation Court, not here. He has elected the remedy, he has made an election." And I want to tell you as to that part, your Honor, I indicated to Judge Cafiero, and cited the cases to him, that when it came to a matter of this sort that it was not compensation and the common law suit was not exclusive but inclusive, and the Court seemed to go along with that theory.

Now, as to the question of admissions, if you are going to hold my statement that I did not consider that we had a good Compensation claim as an admission against my client, then you have got to take and weigh that as against an admission made by Mr. Wille in which he said, "They have a Compensation claim, that's where they belong. They don't belong here in the common law suit." How these people can come in now and blow from both directions, hot from one direction and cold from another, is beyond me. If they did not believe we had a Compensation claim instead of a common law claim, why would they have put that in their answer and pre-trial order? I mean we can do a lot of talking about this thing, but I still say that regardless of (28) what a lawyer says in the course of an argument, when you attempt to apply that as an admission against a Petitioner's right to proceed in Compensation you are in the same position there as where that same lawyer might have entered into an agreement under

which he bartered away the rights of his Petitioner in Compensation, or attempted to barter away the right of his Petitioner by settling in a common law suit, or by agreeing that there was no compensable claim. That would not detract from the absolute right given by the statute in this Court to proceed to consider that kind of a claim in Compensation.

Now, may I say, your Honor, that the allegation in the claim petition that the decedent became ill on his tour of duty, that he was required and directed to drive his bus in a sick condition until he could be relieved, and that the exertion of so driving his bus aggravated his illness and brought about his death, that is something which will be proven by the medical testimony in the case, because it will be the same medical testimony that we had up above. It will be proven by the autopsy in the case, and the autopsy is the same that we had up above. (29) And so, regardless of what I might say, until all the evidence is in in this Compensation claim and your Honor comes to decide it, I don't think that what either party said as to whether there was merit or was not merit to the Compensation claim, is the thing upon which you can make the decision to dismiss this Compensation claim petition filed by the widow in this case.

Mr. Sellick: May I say something for a minute?

The Deputy Director: Yes, one minute.

Mr. Sellick: I notice Mr. Gordon said nothing about the facts of the case. When your Honor goes over the pleadings, I think you will find the facts are the same, and they were unable to prove it by their own witnesses in the negligence action. But the factual situation is the same and is the subject matter of this suit. Also, he makes a statement that Mr. Wille said it was a compensation case. If that is in the record, I don't know anything about it. If you will look up the transcript, you twice called on Mr.

Wille to make a statement that it was a compensation case. You asked him to do it and he didn't do it. So if he did it, it doesn't appear (30) there.

Mr. Gordon: It was on his motion. The entire three and one half hour argument isn't there. That was the very first point I raised on the motion.

Mr. Sellick: If Mr. Wille admitted that on his motion, why did you say, "If she has any right to recovery her right of action is in the compensation court"? Also——

The Deputy Director: Your time is up.

Mr. Gordon: You don't have the benefit of the whole argument up there.

The Deputy Director: Give me the exhibits, and give me the argument.

(Mr. Sellick hands papers to the Deputy Director.)

The Deputy Director: I will look over everything, and reserve decision at this time.

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(31) March 16, 1955.

Before:

Hon. Stephen J. Lorenz,
Deputy Director.

(Appearances as before.)

(31B) Mr. Gordon: Now, if your Honor please, I think that this case is one in which I would like to make an opening statement in regard to the situation. May I have the benefit of the stipulation in writing which Mr. Sellick and I made?

(Paper presented to Mr. Gordon.)

Opening Statements.

Now, if your Honor please, this case is a case by the widow, who it is conceded by the other side to be the widow of the decedent, Harry Kream. The decedent was employed by the respondent on February 2, 1952, as a bus driver. He had been working for some years for the Public Service as a bus driver. Now, on that particular day of February 2, 1952, he became ill while he was working and he made a telephone call from the terminus at Military Park to his boss, a Mr. Fred Ulbrich, and indicated to him that he was ill; that he had chills and fever and that he was sweating and he wanted a relief man. Mr. Ulbrich instructed him to take the bus to a point northerly from Military Park where he would give him a bus driver to relieve him. This man drove the bus in this ill condition. The testimony of the two witnesses, Edward Wayda, who relieved him up at this northern point in the City of Newark and Fred Ulbrich was taken at a trial in (31C) the Essex County Court in the Law Division where a suit had been brought on the theory of negligence, the particular negligence being that a sick man was not attended to when stricken by his employment and therefore died. The doctrine being the humane doctrine laid down in the famous case of Szabo *vs.* The Pennsylvania Railroad. That suit was taken from the injury and the complaint dismissed. The claim petition is being moved now. The theory of this claim petition is that while the man was stricken and complained that he was sick down at Military Park that that particular illness did not—we are not claiming that it arose because of his employment, but when he was required in that condition to drive a bus, that added an insult to the particular illness and caused him to go into a heart attack driving that bus through City traffic in the City of Newark; the distance that he drove it to the point where they gave him a relief man and as a result he died some minutes later after delivering the bus to his relief man when he was going home.

An autopsy was done and the medical proofs in the case, based upon the autopsy, will indicate that he died of a heart condition and that that condition started down at Military Park when he made the call (31D) around that time and that when he had to drive the bus through the traffic that that brought about the added insult to the heart which was too much for him to take and that caused him to pass out.

That is the theory of this claim petition and I would like to now start offering the proofs I have in the case.

Mr. Sellick: If your Honor please, I feel that that opening calls for an answer.

At the trial in the Bureau or, rather—withdraw that. As your Honor probably knows by the papers before you, at the conclusion of the trial up in the County Court before Superior Judge Shapiro, I filed certain papers before the Court and made a motion before Deputy Director Wegner that this case be dismissed on several grounds which were stated there, res judicata, waiver of estoppel, election of remedies and some other reasons. Your Honor hasn't heard that motion and it was decided by Judge Wegner. I don't know whether your Honr will be interested in hearing it.

The Deputy Director: I have the order. It has been disposed of.

Mr. Sellick: Not being a final judgment, I couldn't appeal it. Now, Mr. Gordon's statement that (31E) Mr. Ulbrich was instructed to drive the bus——

The Deputy Director: No, Mr. Kream.

Mr. Sellick: Mr. Kream was instructed to drive the bus, that particular issue was up before Judge Cafiero in the Superior Court and in the oral opinion and decision of Judge Cafiero, on page 3, he states——

Mr. Gordon: I am going to object to any reference t that decision. I have no objection to any reference of the

actual evidence in the case and I have stipulated that such evidence of Ulbrich and Wayda may be introduced and we have both agreed that it may be introduced in evidence here, so anything the Court has said on another issue has no bearing here and I will object to it.

Mr. Sellick: If your Honor please, can I state this? We filed with the Court the very thing that I am going to read. It is in your file and when another Court, Judge Cafiero, ruled on this very issue that they are trying to present to you, I claim it is res judicata and they are attempting to have you overrule the Upper Court, over Judge Cafiero. If they have anything, to take it up before the Appellate Division, not to come before you and ask you to overrule Judge Cafiero.

The Deputy Director: My concept of the issues (32) and disposition of the issues in the Superior Court—when I say that the matter ended in dismissal because it was held in substance that the only remedy this widow has in law is in Compensation; is that correct?

Mr. Gordon: That's right.

Mr. Sellick: That's right.

The Deputy Director: And you are now in the Compensation——

Mr. Gordon: And I'm in Compensation Court and anything Judge Cafiero said is not res judicata at all. That point was argued before Judge Wegner and he made short shrift of it in his order, denying the motion. I would like to hand the order back to your Honor. It is an original and we don't have to go into that. All I have stipulated with Mr. Sellick is that the testimony of these two gentlemen from the Public Service was to be considered in evidence as petitioner's proof on the factual situation covered by their testimony together with answers to such additional pertinent questions to these two witnesses so that the deputy director may allow either party to ask at this trial and

then I said, the petitioner may offer other factual proof. That is paragraph 4 of the stipulation which I signed on October 15, 1954.

Now, to say that this Court is asked to sit (33) as a Court over Judge Cafiero is a lot of nonsense. I'm not that stupid to think that this Court could do it. I am not asking it and if this Court were to do that, it would be committing error. We are here purely as a compensation matter. Anything Judge Cafiero says has no bearing in this case. The only thing that can be considered is what we stipulated to, namely, Wayda's testimony, Ulbrich's testimony; that's all. That's what we stipulated to.

The Deputy Director: Is this the testimony that is before me now (indicating)?

Mr. Gordon: You have the decision of Judge Cafiero which I don't think counsel should have handed up to you. I have no objection of your Honor reading it all, if your Honor please. It should not be in evidence, however.

Mr. Sellick: It is before the Court on motion and I can treat this case as a continuation on the motion because, as I said, I was unable to appeal the results of the motion because it wasn't a final judgment, so these things are before the Court——

The Deputy Director: For the record: I have studied the testimony of witness Edward J. Wayda and of Fred Ulbrich, as contained in the transcript of testimony of the Essex County Court, (34) Law Division, docket No. 95567. I have also studied the transcript of proceedings entitled "Excerpts from argument," before the Honorable Judge A. Cafiero, J. S. C.

It is my opinion that I am to hear this case de novo as an ordinary Workmen's Compensation case—the proofs by the widow for the alleged death by accident of her husband, and that is my attitude and that is to be the procedure today.

Mr. Sellick: But, as I understand it, your Honor has no desire to rule on a matter that has already been ruled upon in another court. Can I just read you something from the law on res judicata?

Mr. Gordon: It has been argued before Judge Wegner. He is asking you to review Judge Wegner.

The Deputy Director: May I ask Mr. Sellick this question? What was the reason for the dismissal in the Upper Court?

Mr. Sellick: Failure to prove negligence. Among the allegations of which are the same allegations and the same attempt to prove the same things that are before this Court. If your Honor will look at the complaints which you have before you from the Upper Court and the pre-trial memorandum (35) which is most important in the Upper Court, it is alleged that "On February 2, 1952, while plaintiff's intestate, Harry R[illegible]am, was engaged in his duties as the operator and driver of said bus"—I am now reading from the pre-trial order, your Honor, which is filed with you, "he became very ill, necessitating medical attention and other emergency medical care, which illness was made known to the defendant corporation through its agents, servants and employees." Those allegations in that pre-trial order setting forth the issues are the same ones that were used in the Upper Court and that is what they were ruling on: (Reading) "The defendant was negligent in that it failed to furnish plaintiff's intestate with proper care and medical treatment after having knowledge of his stricken and helpless condition, and directed plaintiff's intestate in such condition to drive and operate a bus for a considerable distance, at the end of which it relieved the said plaintiff's intestate of his driving and operating the bus, but it was further negligent, in that, through its agents, servants and employees," left him alone and unattended—and in this case he was relieved from his bus by

a driver and was not abandoned to his own resources, permitting him to drive an automobile by himself towards his home in (36) such stricken and helpless condition. I say that they are the very same allegations that they come in here and tell you that are to make it a compensable accident. The Superior Court Judge, Judge Cafiero, sitting in the Superior Court, having ruled on it and the law of res judicata as: (Reading) "The doctrine of res judicata is grounded in the universally accepted principle that the party has litigated, or has had an opportunity to litigate the same subject matter on the merits in a prior accident in a court of competent jurisdiction and therefore is on grounds of natural justice precluded from again litigating to the vexation of his adversary and the decision, estoppel unsettlement of established right." So I ask this question: What factual issue is involved in this case that was not involved in the other case?

The Deputy Director: Lack of negligence.

Mr. Sellick: Well, negligence is a conclusion from facts. I say, what factual issue?

Mr. Gordon: Can I answer?

The Deputy Director: No, no. I repeat: My conception of this case as presented to me by the record, by the arguments of Court and counsel in the Upper Court is that this is a proceeding here today on Workmen's Compensation where negligence plays (37) no part. I was most interested to know from the pleadings and the record in the Upper Court the theory on which the petitioner, or plaintiff, was proceeding against the Public Service. The decedent admittedly having been an employee. Now, the petitioner, or plaintiff, has failed in the Upper Court on its theory of negligence. It is my opinion, and I so find, that the plaintiff, or the petitioner in this case, the widow, has the right under the statute to present her Workmen's Compensation claim, whatever the outcome. I am not pre-

judging this matter and if my conception of the proceedings and disposition in the Upper Court is correct, as I think it is, the widow has standing in this court. Call your witness.

Mr. Gordon: Thank you.

Now, at this time, if your Honor please, even though it is in the file, I want to specifically offer in evidence the stipulations made in this Workmen's Compensation case in the action between Henrietta Kream, petitioner, vs. Public Service Coordinated Transport, respondent. Claim petition number being a dependent's claim petition No. B-11571. The stipulation made between Milton Albert, attorney for the petitioner, and David M. Sellick, attorney (38) for the respondent, dated October 15, 1954.

Mr. Sellick: No objection.

Mr. Gordon: I offer that as P-1.

(Paper received and marked in evidence as Exhibit P-1, as of this date.)

Mr. Sellick: If your Honor please, I would like to state at this time, as long as Mr. Gordon is offering exhibits, that I know, as a result of the motion before Judge Wegner, that there are certain papers in your file and which are available to you, and I am treating this case as a continuation, as a result of the denial of the motion, so I am going to assume in my different arguments that these papers are before you and in your file.

The Deputy Director: Here is the file. Unless you recognize and identify them—off the record.

(Discussion off the record.)

Mr. Gordon: I know what is in the record, as far as in the file. It can be stated, your Honor, as far as what is in the file, even though there is something in there that is

outside of the evidence here, I know that it won't affect you in any way and I'll let it remain there.

The Deputy Director: Off the record.

(39) (Discussion off the record.)

The Deputy Director: Let us proceed.

Mr. Gordon: Just a moment, your Honor. I don't think they can indicate that no notice was given to them because they were notified.

The Deputy Director: Well, I suppose—this is off the record.

(Discussion off the record.)

The Deputy Director: Now, I will hear you gentlemen. Go ahead.

Mr. Gordon: I will also, if your Honor please, I have Mr. Milton Albert here and a gentleman from the Chief Medical Examiner's office, but I don't think he has to remain. We have stipulated as set forth in paragraph 5 of P-1 in evidence, the stipulation. We have stipulated and the respondent consents that the autopsy report of Dr. Homer Schaaf, Assistant Medical Examiner of Essex County, covering the autopsy of the decedent, made on February 2, 1952, shall be admitted into evidence as Petitioner's Exhibit, so I offer it as an exhibit, and that is the original exhibit and report. I offer it as Exhibit P-2 to be marked in evidence.

(Paper received and marked in evidence as Exhibit P-2, as of this date.)

(40) Mr. Gordon: Off the record.

(Discussion off the record.)

Offering of Exhibits.

Mr. Gordon: I will also, in accordance with the stipulation, Exhibit P-1 in evidence, at this time offer the transcript of the testimony taken in the Essex County Court before Superior Court Judge Anthony J. Cafiero, who is temporarily assigned to sit in the County Court; the testimony of the witness, Edward J. Wayda; the testimony of the witness Fred Ulbrich, carbon copy of which is here, but I will concede that such carbon copy is a duplicate of the original of the testimony because it has been authenticated by the official court reporter, so I ask that that be marked in evidence as Exhibit P-3.

(Transcript received and marked in evidence as Exhibit P-3; as of this date.)

Mr. Sellick: This is the copy, as I understand it, that I ordered from the court stenographer, and as a result of our agreement and stipulation, I filed it with Deputy Director Wegner some months ago.

Mr. Gordon: On the motion, but I'm offering it as the petitioner's exhibit.

The Deputy Director: P-3.

(41) Mr. Sellick: It wasn't on motion. It was as the result of the stipulation. It's in the Court's file. I believe the Court has even said he has read it.

Mr. Gordon: What difference does it make? I am offering it in evidence.

The Deputy Director: For the record, gentlemen. I read the transcript, P-3, and the Court's argument and counsel's argument, because it was my understanding that counsel who called on me some time ago suggested that I do so to be prepared for today's argument.

Mr. Gordon: Yes.

The Deputy Director: All right.

Mr. Gordon: That was with my consent. Mr. Sellick asked if he could submit it to your Honor and I consented

to that, so that you would be familiar with what transpired in advance of the trial.

The Deputy Director: Proceed.

Mr. Gordon: That is Exhibit P-3, now, that your Honor has.

The Deputy Director: Yes.

Mr. Sellick: Now, I would also like to state for the record that in this stipulation, Exhibit P-1, (42) in paragraph 1 the respondent conceded that on February 2, 1952, the petitioner's decedent, Harry Kream, was employed by it as a bus driver and his weekly wages was $78.76 gross; that it further conceded in paragraph 3 of Exhibit P-1 in evidence that the Compensation rate in the event of liability was $25 per week, the then maximum rate, February 2, 1952.

Mr. Gordon: I think the rate was $30, not $25. You are mistaken about that.

Mr. Sellick: Well, we sat down at the time we made that stipulation. If it is untrue—I don't know that that is untrue. We specifically went out and inquired about the statute before we made it.

The Deputy Director: January, '51.

Mr. Gordon: '51. I think we were wrong, but the Court can determine the rate.

The Deputy Director: All right. Make that an issue.

Mr. Gordon: I would also like to state for the record that in Exhibit P-1, the stipulation, it was conceded by the respondent in paragraph 2 of P-1 in evidence that the petitioner, Henrietta Kream, is the widow of said decedent, Harry Kream, and his sole and only dependent, and the petitioner withdrew (43) the allegation of paragraph 5 of the claim petition that Dora Clark was also a dependent and the petitioner conceded further that she was not a dependent of the decedent, Harry Kream, so that there is only one dependent.

Mr. Sellick: I would like to state in that regard that the stipulation speaks for itself and I think your Honor can read it like Mr. Gordon read the part "Employed by the respondent as a bus driver." The stipulation itself says that, "during the time he was driving the respondent's bus," so I ——

Mr. Gordon: Well, what is the distinction? Aren't we splitting hairs?

The Deputy Director: Gentlemen, it is part of the record.

Mr. Sellick: I think it speaks for itself. On that $25 rate, your Honor, I think the stipulation speaks for itself on that.

Mr. Gordon: If there is an award of $5 difference by a wrong stipulation on rate, the Court can determine that.

Mr. Sellick: Listen, if you and I——

The Deputy Director: Off the record.

(Discussion off the record.)

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(44) MORTON BLUM, called as a witness on behalf of the petitioner, having first been duly sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Mr. Blum, where do you live? A. 190 Grumman Avenue, Newark.

Q. In Newark? A. (Witness nods head affirmatively.)

Q. And what is your business? A. Insurance agent.

Q. Now, Mr. Blum, you didn't know the—you don't know the petitioner in this case, do you, outside of having seen her here in court? A. No, outside, no.

Q. And I believe you testified in this case in the Essex County Court; did you not? A. Yes, I did.

Q. Now, Mr. Blum, on February 2, 1952, were you operating your automobile on a public highway in the City of Newark and did you see anything while doing that? Did you see anything unusual happen? A. I believe that's the date that the accident——

Q. Yes. A. —that the accident occurred. If that's (45) the right day, I'm not sure myself.

Q. Yes, February 2, 1952 is the date. We have so stipulated. A. I was driving my car in an easterly direction on Hawthorne Avenue in the vicinity of, I guess, it is Leslie Street, in Newark. There was a car in front of me. At that time, I did not pay close attention to what type of car it was, but there was a car in front of me and it veered off the road and it went up on the sidewalk and hit a brick retaining wall in front of an apartment house, of course, on the left-hand side of Hawthorne Avenue.

Q. On the left-hand side of the direction in which you and this other car was going? A. That's right. He went across this other line—oncoming line of traffic and——

Q. And into a brick wall? A. Right.

Q. Did you obey your human instinct and respond to the emergency that was there? A. Yes, I got out. I was the only one there at the time and tried to help the man. At that time I didn't know who it was, but it was Mr. Kream, and he was down on the floor board of the car when I got there.

(46) Q. Can you tell the Court, Judge Lorenz, please, what you observed about his condition? A. When I first got to him, your Honor, he seemed to be moving. I didn't notice any wounds that might come from the impact. I might add that the impact was not a very strong one because he had to go through some hedges before he hit the wall. It didn't seem to be strong, but he was bleeding from the mouth, that was it, from a hemorrhage, and I had had some Firt-Aid training and tried to render First-Aid, and

while I was in the car he seemed to have passed away while I was in the car trying to render First-Aid.

Q. You say you saw him moving as you came up to the car? A. Yes, I did.

Q. Just what do you mean by that? A. There were movements of his hand. He seemed to be trying to talk to me. I asked him whether there was anything I could do, whether anything hurt him. I didn't want to move him. He tried to talk, but he couldn't. He couldn't speak.

Q. He couldn't speak? A. Legibly; I couldn't hear.

Q. How long did you observe those movements? (47). About how long? A. At least several—at least a few minutes, because there was a time that lapsed before the police got there when I had crawled out of the car.

Q. You crawled out of the car, you say? A. Right. The right-hand door was locked. It was a two-door car and the left-hand door was barely open—just room enough for me to crawl in, wedging the door open and crawl out again.

The Deputy Director: Excuse me, you were going toward Newark on Hawthorne Avenue in an easterly direction?

The Witness: Yes.

The Deputy Director: He was going westerly?

The Witness: No. He was in front of me going in the same direction.

The Deputy Director: Oh, in the same direction.

By Mr. Gordon:

Q. And you say suddenly you saw his car—what did you say, "veer"? A. Veered off.

Q. And across the oncoming lane? A. Right.

Q. He then mounted the curb on the sidewalk, struck (48) the hedges, and then the building; is that right? A. Not a building—retaining wall for a lawn, in front of the building.

Q. How long would you say that you were near him before you went to get the police? A. Well, when I first responded to the car there was a young boy across the street and I yelled across the street for him to call the police right away, so they presumably called for the police before I even looked at Mr. Kream. I yelled for the police right away.

Q. How long would you say you were with the decedent before the police came? A. It must have been close to ten minutes.

Q. Now, in that ten minutes, did you observe him the whole time? A. The last—the last few minutes, possibly, I didn't, because he seemed to have passed away already—in a layman's—my own opinion, so that was when I went out of the car.

Q. How long do you think you were there before you felt he had passed away? A. Oh, approximately five minutes.

Q. About five minutes? A. Five or six minutes.

Q. And the movements that you described that you (49) saw him make only lasted two or three minutes; is that right? A. About that. It's very hard to pin——

Q. Pin-point it, right? A. To arrive at a minute or two, either way.

Q. But it was only a very short time before he stopped making any movements; is that right? A. Oh, yes. (Witness nods head affirmatively.)

Mr. Gordon: Now, at this time, if your Honor please, I would like to offer in evidence death certificate of the City of Newark, certified to by Harry S. Reichenstein, City Clerk, Registrar of Vital Statistics.

The Deputy Director: Show it to Mr. Sellick, please.

(Paper presented to Mr. Sellick.)

Mr. Sellick: I have no objection—real objection to it. I think the autopsy answers the same questions, but they can put it in.

The Deputy Director: P-4.

(Paper received and marked in evidence as Exhibit P-4, as of this date.)

The Deputy Director: Mr. Blum, Leslie Street on Hawthorne Avenue is below which street westerly, do (50) you know?

Mr. Sellick: What is up the westerly way?

The Witness: One more street.

The Deputy Director: Was it 18th Street?

The Witness: No, no, there is another street below that down where the Roosevelt Theatre is on Clinton Avenue.

The Deputy Director: Yes.

The Witness: Well, there is the street just below Roosevelt. There is a traffic light on the corner that street comes into.

The Deputy Director: Off the record.

(Discussion off the record.)

The Deputy Director: Above Silver's?

The Witness: Yes. This accident occurred about a block and a half above Silver's.

The Deputy Director: Westerly?

The Witness: Right, westerly.

The Deputy Director: Towards Irvington?

The Witness: Yes.

Mr. Gordon: You can cross examine.

Cross examination by Mr. Sellick:

Q. Mr. Blum, as I understand it, you said you paid (51) no particular attention to this car until it went across the street; is that right? A. No attention in this respect:

I don't think I could—I could have, at that time identified whether it was a man or woman.

Q. How many years have you been driving? A. Thirteen.

Q. In that time, you have been behind a car; haven't you? A. Yes.

Q. The only reason you remember this particular car was that he swerved and went across the street; isn't that true? A. Yes.

Q. From what you said, and you paid no particular attention; is that right? A. Well, no particular attention, except, if I recall, I was a little more alert because I believe the Air Raid sirens had just sounded. There is a siren right along the park somewhere. The windows were open, I almost went out of the car when it started sounding. If anything, I noticed that a little bit, but, other than that, I didn't notice anything in particular.

Q. You don't know whether the Air Raid siren (52) scared Mr. Kream; do you?

Mr. Gordon: Just a moment. I object to that.

The Deputy Director: What day of the week was it?

The Witness: On Saturday.

The Deputy Director: Oh, that was Saturday?

The Witness: (Witness nods head affirmatively.)

The Deputy Director: What time of the day was it?

The Witness: It was right about noontime.

By Mr. Sellick:

Q. As I understand, he went across an upper curb. Was there a curb there? A. Yes, there is a curb on both sides of the sidewalk.

Q. He went up a curb, through a hedge, and into a retaining wall? A. Well, the hedge is right up against the retaining wall.

Q. And you got out and stopped your car a little beyond where he went up; is that true? A. That's right, on the right-hand side of the street.

Q. When you went up to him in the time of two (53) minutes, you tried to communicate with him, but didn't have any success; is that correct? A. He was trying to say something, but——

Q. But you had no success? A. No.

Mr. Sellick: That's all.

Mr. Gordon: That's all, Mr. Blum.

(Witness excused.)

HENRIETTA KREAM, called as a witness on her own behalf, having first been duly sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Mrs. Kream, you are the widow of the decedent, Harry Kream; are you not? A. Yes.

Q. And when did you marry Mr. Kream? A. April 2, 1949.

Q. Where? A. Millburn, New Jersey.

Q. And of course you lived together with him as husband and wife; did you not? A. That's right.

Q. Until he died? A. Yes.

(54) Q. How long had you known him before you married him? A. Two years.

Q. Now, from the time you first met Mr. Kream until the day that he died, can you tell us what you observed about his state of health, generally? A. Well, I never knew him to be sick; perfectly normal, other than a cold, headache, or something like that.

Q. Was he treated for those colds when he had them occasionally? A. Yes, he was, yes.

Q. By a doctor? A. By a doctor, yes.

Q. Who would come to the house? A. Yes, or he would go to the office if he was able.

Q. Now, in the period of time that you were married to him, did he lose much time from his work as a bus driver for the Public Service? A. No.

Q. How much time would you say, in the period you were married to him, would he lose, if any, or did he lose any? A. Occasionally, he might have taken an afternoon off, or something like that, but I don't think more than once.

(55) Q. Was it any extended period of absence? A. No.

Q. From his employment, I mean. A. No.

Mr. Gordon: You can cross-question her.

Cross examination by Mr. Sellick:

Q. When did you say you married Mr. Kream? A. April 2, 1949.

Q. Have you ever remarried, Mrs. Kream? A. No.

Q. Have you remarried? A. No.

Q. Back in April, 1952, did you make a claim against the Prudential Insurance Company for double indemnity for your husband's accident in striking the wall on Hawthorne Avenue? A. I don't remember whether it was double, whether the claim was paid for double indemnity or not. The claim was made.

Q. Did you have some conversation or some correspondence with Mr. Connors in the Prudential? A. It's possible that I did have, due to the policy, yes.

Q. Well, they paid you the full amount of the (56) policy; didn't they? A. Not immediately, no.

Q. Well, they did pay it? A. Yes, yes.

Q. Within a short time after his death, and then you raised the question with the Prudential of double indemnity because of his death in striking the wall? A. Well, that I don't——

Mr. Gordon: I am going to object to that. I don't think that is at all material. It goes far beyond the scope of direct.

Mr. Sellick: It goes to credibility as viewed against the proof in this case.

The Deputy Director: All right. Let Mrs. Kream answer it. Go ahead.

The Witness: I don't recall whether it was double indemnity or not. I remember putting in the —file for the insurance, but I don't remember what it was for.

By Mr. Sellick:

Q. Did you ask for a copy of the policy to study? A. Did I ask for a copy? No.

Q. Did you have any dealings with the Prudential at all about the matter, double indemnity? A. Other than that they—should I answer this, Mr. Gordon?

(57) Mr. Gordon: Yes.

The Witness: Other than they objected at the time of paying the policies. The only trouble I had with them, due to the fact that the policies were only taken out, I believe, not quite a year before Mr. Kream's death.

Mr. Sellick: That's all.

Re-direct examination by Mr. Gordon:

Q. Did you ever get any double indemnity from the Prudential? A. No.

Q. Didn't they turn you down on any other payments other than the face amount of the policy, which was the policy amount of life insurance? A. Yes.

Re-cross examination by Mr. Sellick:

Q. In response to your attorney's questions, you can now remember that they turned you down for other than the face of the policy.

Mr. Gordon: I object. That is argumentative.

Mr. Sellick: That's the proof. I'm asking——

Mr. Gordon: That's argumentative, if your Honor please.

(58) The Deputy Director: Sustained. Gentlemen——

Mr. Sellick: All right. No questions.

Mr. Gordon: You may step down, Mrs. Kream.

The Deputy Director: That's all.

(Witness excused.)

Mr. Gordon: If your Honor please, I have no desire to call Mr. Ulbrich or Mr. Wayda. I'm satisfied with the testimony in the case as they gave it up above in the Essex County Court in the negligence suit. There, I had a problem to establish negligence. Their testimony, in my opinion, if your Honor please, indicates that after reporting in sick, he drove his bus up to where he was relieved through the City traffic in Newark. It makes no difference to me as I view this case, that Mr. Ulbrich told him to drive it in that condition he was in or that he didn't tell him to drive it, so long as the employment was the insult which brought about the attack and the death. That's all I care about. That's all I have to establish here so far as I am concerned. I rest upon —as to the factual lay proof, upon the proof already adduced, plus the proofs contained in Exhibit P-3 in evidence, and I will now call Dr. Michael Ritota to testify.

(59) Mr. Sellick: In answer to that statement, I would just like to state that the problem up in the County Court was to establish facts upon which the Court could draw a conclusion of negligence. If the proofs show and it was so ruled upon by the County Court that the facts were not established, I think it is important in this case. In addition to that, counsel seems now to take the position that the employment was the insult and that that's enough. I think you have to prove an accident arising out of and in the course of employment still in compensation——

The Deputy Director: Of course, the petitioner is still calling his witnesses.

Mr. Sellick: I know—just as to that part.

Mr. Gordon: I am calling the doctor. But I have to say one more word in answer to Mr. Sellick.

The Deputy Director: I don't think an answer is necessary at this time.

Mr. Gordon: All right, sir. May I just have a moment to confer with my witness?

(Short recess.)

(Trial resumed after the recess.)

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(60) Dr. Michael Ritota, called as a witness on behalf of the petitioner, having first been duly sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Dr. Ritota, you are a practicing physician of the State of New Jersey? A. Yes, sir.

Q. And when were you admitted to practice in this State? A. 1946, sir.

Q. And where did you get your degree of M.D.? A. In St. Louis University, St. Louis, Missouri, 1940.

Mr. Sellick: I would like to state at this time, if you will tell us the doctor's special qualifications, I will admit them. I don't know the doctor. If you want to qualify him, it is all right.

Mr. Gordon: All right. Thank you.

By Mr. Gordon:

Q. What is your specialty, Doctor? The doctor's specialty is the heart, but I would like to qualify him on the record.

Mr. Sellick: All right.

Mr. Gordon: I might say to your Honor, that (61) he testified in the Essex County Court and his qualifications there were also spread upon the record. Mr. Wille made the same concession Mr. Sellick has made.

By Mr. Gordon:

Q. Now, Doctor, since you graduated from the College of Medicine of St. Louis University in Missouri, were you admitted to any other State to practice medicine besides New Jersey? A. Yes, in Missouri, 1940, I was approved for practice.

Q. Now, between that time, that year of 1940 when you were admitted to practice as a physician in Missouri and the time when you were admitted in the State of New Jersey to practice, were you engaged in the practice of medicine? A. Yes, I was. I was engaged in the practice of medicine in the United States Army from 1941 to 1946.

Q. And where? A. Well, I was—before I went overseas, I was here in the United States and then I was in

battle, in the infantry in New Guinea, and then when I returned I was in the Army and Navy General Hospital.

Q. Where? A. In Arkansas—Little Rock, Arkansas, when (62) I was stationed here, and also in Brooks General Hospital in San Antonio, Texas.

Q. Were you a battlefield surgeon then? A. In New Guinea I was a battlefield surgeon—battalion aid surgeon.

Q. And did you specialize in any particular field during your service over those years with the United States Army? A. Yes, in the last two years I was in the field of internal medicine with emphasis on cardiology.

Q. And those two years were what years? A. 1944 to '46, inclusive.

Q. 1944 to '46? A. (Witness nods head affirmatively.)

Q. And that was at the Army General Hospital in Arkansas? A. And in San Antonio.

Q. San Antonio? A. Texas. And Camp Howes in San Antonio, Texas, also.

Q. And in the course of your battle activity in New Guinea, did you have occasion to observe members of the Armed Forces with cardiac effects sustained in battle? A. Yes, sir.

(63) Q. And did you treat such cases in New Guinea? A. I did, sir.

Q. Now, Doctor, would you please tell us what rank you were discharged with from the United States Army? A. Major, Medical Corps, in the United States Army.

Q. And did you receive an honorable discharge? A. Yes, sir, I did.

Q. Now, Doctor, when you were admitted to practice in New Jersey, did you go into your own private practice immediately upon being admitted as a physician here in this country? A. I did, in part-time, and part-time to postgraduate study to further my training in cardiology.

Q. Where did you have that post-graduate study? A. At Columbia University.

Q. College of Physicians and Surgeons? A. Yes. At New York Bellevue Medical School and in Emory, Georgia —University of Emory.

Q. Medical school? A. Yes. In Toronto, Canada, the University of Toronto.

Q. In the medical school there? A. Yes, sir. And at —I don't recall very clearly, there's one or two others there—well, Johns-Hopkins (64) in Baltimore.

Q. Johns-Hopkins Medical School of Baltimore? A. Yes, that's right.

Q. Over how many years did you go in for that post-graduate work? A. Well, that's been since 1946 and I've still been doing it now. I'm still doing it. I'd say continuously since 1946.

Q. And to what subjects of medicine have you particularly confined yourself in those post-graduate studies? A. I'd say the majority of them are in cardiology.

Q. Now, Doctor, are you presently connected with any hospitals in your specialty of cardiology and internal medicine? A. I'm on the associate—I'm an associate on the cardiac staff at St. Michael's Hospital.

Q. In Newark? A. In Newark, New Jersey, sir. I'm assistant in cardiology in St. Mary's Hospital in Orange. I am attending in medicine at Columbia Hospital and Director of the Department of Medicine at Columbus Hospital.

Q. Director of the Department of Medicine? A. Medicine, yes, sir.

(65) Q. Columbus Hospital in Newark? A. Yes, sir, in Newark. And I'm on the courtesy staff of the Coit Memorial Hospital and assistant in medicine at Lutheran Memorial Hospital or the new Clara Maass Hospital, and assistant in medicine at St. Michael's Hospital, and have

been a lecturer in a post-graduate program of St. Michael's since 1949.

Q. Lecturing on what? A. On cardiology.

Q. Are you connected with Beth-Israel Hospital? A. Yes. I have courtesy privileges there, Beth-Israel.

Q. Did you know the late Dr. Aaron Parsonet? A. Yes. I was——

Mr. Sellick: I object.

Mr. Gordon: Well, now, I'm going to bring out—it isn't material on qualifications——

The Deputy Director: Go ahead.

The Witness: I have had three years of training in clinic training with Dr. Aaron Parsonet——

Q. Working under him? A. Yes.

Q. At what clinic? A. Beth-Israel Clinic, and at the Beth-Israel Hospital in Newark.

(66) Q. Now, Doctor, I show you Exhibit P-2 in evidence, which is an autopsy report from the office of the Chief Medical Examiner of the County of Essex, bearing case No. 45989, consisting of the autopsy protocol of the post mortem performed on the body of Harry Kream at Mullins' Morgue on February 2, 1952, at 2:45 p. m., two hours—or about two hours after death, and I will ask you to examine that, Doctor. I want you to take each item, item by item, of that autopsy as you did in the Essex County Court, and tell us—explain the medical terminology and tell us what the condition was of the decedent with regard to the particular organ as determined upon autopsy?

Mr. Sellick: Your Honor, I would like to say that I object at this time in explaining each particular thing. I think this will only draw it out. The autopsy speaks for itself. Your Honor has heard more medical cases and are more familiar with medical cases

than a jury is. If counsel wants to have it done——

The Deputy Director: I really don't know how the doctor will do this, but let the doctor proceed and we will see.

Mr. Gordon: May I say to your Honor, I don't want to take up time, but this autopsy, as the doctor (67) will testify to it, will explain that this was a heart death and nothing else. Now, if counsel will concede that it was a heart death and nothing else, we can go into the question of the autopsy.

The Deputy Director: Proceed.

By Mr. Gordon:

Q. Doctor, will you take under the caption of "Autopsy," and under the caption "Pathological—anatomical summary," and state for us, sir, what is given as the primary cause of death, and will you explain to us what that means?

Mr. Sellick: May I have it stated for the record what they mean to this particular doctor?

Mr. Gordon: Oh, now, just a minute.

The Deputy Director: The doctor will be——

Mr. Gordon: If there is any qualifications—questions about his qualifications as a cardiologist, I——

The Deputy Director: Is there any objection?

Mr. Sellick: He is going to explain what that means to him. That's all I wanted to get on the record.

The Deputy Director: Just a moment. I will allow it, until the doctor—until there is something objectionable.

(68) Mr. Gordon: It is not just what it means to him. This man is qualified as a specialist.

The Deputy Director: Proceed.

The Witness: Under the primary cause of death, coronary arteriosclerosis, severe, occlusive, I think, if we separate these individually we can say, "Coronary" is defined as the arteries which supply the heart musculature with blood. These are known as the coronary arteries. "Arteriosclerosis" means a hardening of the arteries due to deposition of calcium and fat substances, and "Severe" means that there are various grades of it from mild to moderate to severe. So this would be classified probably as the most advanced stage. "Occlusive" means that the lumen, or the opening of the artery is completely obliterated by the arteriosclerosis or the process in which there is a deposition of fatty substances and calcium, so that the opening into this tube or coronary artery is completely occluded. That's what the word "occlusive" means.

Q. Now, Doctor, will you continue with the next item, please, and tell us exactly what have been your findings? A. Do you want me to continue on page 2?

(69) Q. Yes. A. On page 2 there is an anatomical positioning and picture of the body in the front view and in the back view or posterior view. There are some inscriptions made here pointing to the face where it says, "Flecks and streaks of blood from operation of the upper lip." Then there is another one stating, "Mottled cyanosis." That means a bluish discoloration of the skin or its layer, involving the regions of the neck and the shoulders in the front view.

Q. What is cyanosis due to, Doctor? A. Cyanosis is due to lack of oxygen. Then on the right forearm there is a boat tattoo mark. It says, "Homeward bound," letters "H. K." in italics.

In the posterior views of this body there is a purple blanching lividity. This term "lividity" means that there

is a dependent, a dropping of the blood by virtue of its weight in the body, which has been laying in one position, particularly a dead body, so that there is a purplish discoloration to the entire surface of the body, which is the most dependent, or lowest portion of that body. There is no comment or markings on the lateral or side views of the body.

Q. That diagram is where, Doctor? (70) A. That's on page 2.

Q. Page 2. Proceed. A. On page 3 there is a drawing or a picture of the upper and lower jaw. There is a typewritten statement which states, "Upper and lower plates, upper central incisors are chipped."

Then, below that, there is a view of the skull, external and internal, that is, outside and inside. These views show no fractures or hemorrhage and that also goes for the lateral views, the right-sided view and the left-sided view of the skull. No fractures or hemorrhage.

Q. In the brain; is that correct? A. Right, in the skull. Under the autopsy's protocol on page 4, under "External examination," sublettered "No. 1," "Clothing, bus driver's uniform."

Under No. 2, the title of "2" is "Frame nutrition, skin, rigor, lividity, decomposition, identification marks, muscles, bones, joints and anomalies." There is this statement, "Middle-aged white male, medium frame, good nutrition, no anomalies." "Anomalies" means "abnormalities." Usually those types of abnormalities with which we are born. Let's say an extra finger or a deformity at birth with which people are born. "Anterior surface of body pale, except for (71) faint mottled cyanosis of neck and upper chest." There is a purple lividity on the posterior surface. I described that previously. The body is warm. No rigor. There is a slight cyanosis in nail beds. No clotting or oedema. This indicates again the cyanosis in the

nail beds indicate a lack of oxygen. There is old rounded scar over the right shin. Tattoo—right arm. No other identification marks.

No. 3, the eyes. The pupils are round, equal, moderately dilated. No hemorrhage.

No. 4, the mouth. Three-quarter inch laceration of the inner surface of upper lip in midline. Moderate amount of stringy blood in mouth and throat. Flecks and streaks of dried blood around the mouth. A laceration is a tear of the surface of the skin. It is usually a ragged tear. It's not a clean-cut wound as an incised wound of a knife or of a razor blade.

"Upper and lower full plates. Upper central incisors are chipped and a fragment is lying loose under the lip."

No. 5, genitals. No penile scars. Normal male.

No. 6, marks of injury: Laceration of lip. See No. 4. No other marks of injury.

(72) Page 5, autopsy protocol "B": Internal examination. Topography of abdomen.

No. 7, panniculus diaphragm. General abdominal topography and lesions. The abdomen is flat. That means that the belly is flat. "Panniculus" is a layer of fat and here it is stated, one-inch thick, lemon-yellow colored and the recti free and clear—The recti are two muscles which run parallel with the mid-line of the belly. They help to support the abdominal contents or the contents of the belly. "Increased amount of intra-abdominal fat." That means that there is an unusual amount of fat within the cavity of the belly, more so than we would find in the average individual. There is no odor to the body cavity. There is no distension of the gut or the stomach. The serosa, pale, smooth and glistening, free and clear.

Q. What is "serosa"? A. The serosa is the covering of the white thin lining of all the bowels and the internal cavity of the belly. This indicates that there is no disease involvement of the internal cavity or the bowels.

"Few adhesions between sigmoid colon and lateral wall and superior surface of liver and diaphragm." Adhesions of this nature are commonly found in many individuals and are probably due to some old mild in- (73) fection of the internal organs where scars have formed to a certain degree. There is no free fluid to indicate any acute process. The presence of free fluid in the cavity of the belly indicates usually some sort of a peritonitis or infection of the bowel cavity. There is a normal organ relationship. In other words, the liver, the spleen, the kidneys and the bowels and the gall-bladder are in good position and good appearance.

The thorax: Topography, symmetrical. That means that the right side of the chest is identical to the left side of the chest. There are no hemorrhages or fractures and it is free and clear. The pleural cavities are the cavities in which the lungs are situated and here the statement is that there is no fluid or adhesions. They are free and clear and usually this indicates that there is no pathology or disease of the lung fields on the surface of the lung fields to irritate the cavity and cause a production of fluid.

"No. 10." The mediastinum: The mediastinum is the space or the position of organs between the heart—between the both lung fields. It usually carries the heart, the great vessels, the branches of the vessels that go to the neck and head and it carries in some cases a thymus gland and it carries the bronchi or the (74) tubes which go from the throat to the lung fields for airway passage. This apparently is free and clear. The lungs, one inch apart at the third rib. The apex or the point of the heart is at the fifth intercostal space in the mid-clavicular line. This is usually a normal position for a heart to be placed in.

Q. Is that finding a normal one? A. Yes, sir.

Q. 11? A. The pericardium is defined as the fine glistening, smooth, thin-walled membrance which covers the

heart entirely. This is described here as thin-walled, pale, smooth, moist inner surface and the heart lies free, indicating that there is no infection or disturbances on the surface of the heart which would cause it to become adhesive or sticking to the pericardium.

Q. In other words, would you say that the finding there was normal? A. Yes, sir.

Q. No. 12 item, please. A. No. 12, "The heart, the right side, the atrium," that is, the heart is divided into four cavities, two on the right and two on the left. The atrium is the upper (75) cavity on the right side and the ventricle is the lower cavity on the right side. The atrium on the right side receives the blood—the venous blood from the body—from the body systems and dumps it into the right ventricle. When the right ventricle is filled, it ejects the blood into the lung fields where it is aerated, through which air passes. And after it has been oxygenated or aerated, it runs by a system of vessels to the left atrium or left-upper chamber. This pours it down into the right ventricle—I mean, into the left ventricle—correction, left ventricle which, in turn, ejects the blood through the great vessel, that is, the aorta, around to the body and supplying oxygenated blood. Now, the atrium on the right side, right-upper chamber is moderately distended with dark fluid, dark blood and clots. This indicates that there has been a congestion in the right-upper chamber. "Tricuspid valve is about three fingers dilated." This is probably——

Mr. Sellick: I object. According to the copy I have, there is no such word in there, "three fingers." "3-f," is there.

The Witness: That's the code that they use.

Mr. Sellick: In other words, I am trying to bring out, the only reason you are telling us is what (76) this means to you.

Mr. Gordon: Just a minute.

The Witness: This is an accepted dictum, sir. This is accepted terminology in medicine.

Mr. Sellick: I don't see the words, "three fingers," in there.

Mr. Gordon: "3-f."

The Deputy Director: "3-f, parentheses Three fingers," according to this doctor.

Mr Gordon: Can we avoid interruption?

The Deputy Director: For the record, counsel is here to protect his client.

Mr. Gordon: Can we avoid interruption? He is very anxious to show what the doctor says. Everything the doctor says means something to the doctor. Of course, if medical science were different with every doctor in the world it would be a nice state of affairs if there wasn't a standard of medicine.

The Deputy Director: "Three fingers." Suppose we start that again. Would you read after "distended," and so on?

Mr. Gordon: "Tricuspid."

The Deputy Director: The entire reference to the right atrium.

(77) The Witness: May I modify the statement and read it as is?

Mr. Gordon: And then explain it.

The Witness: Yes, sir.

(Reading): "Tricuspid valve 3 (f)." This is the upper limits of normal.

By Mr. Gordon:

Q. What does "3-f," mean, Doctor? A. "3-f" means three fingers, dilated.

Q. That's normal? A. That's the upper limits of normal.

Q. Upper limit of normal in—proceed. A. Endocardium means the lining within the cavity of the heart. The valves are the valves—I think that term is self-explanatory—which separates the chambers, the right-upper chamber and the left-upper from the left-lower chamber and the "myocardium" is the heart musculature. It is free and clear.

Q. What was free and clear, according to this? A. The valves in the myocardium of the right heart—of the right side of the heart.

Q. What is "endocardium"? A. The endocardium is the inner lining of the heart on the right side.

(78) Q. Is that free and clear? A. Yes, sir, free and clear. The foramen is closed. The foramen is the opening within the right auricle and the left auricle, or between the right-upper chamber and left-upper chamber which functions while the child or infant is in utero in the mother's womb and it closes soon after birth, or about.

Q. You mean, it is closed during the lifetime of a human being? A. Yes, sir.

Q. In item No. 12, this item, is that a normal condition?

Mr. Sellick: I object to the leading. The doctor is doing the testifying.

The Deputy Director: All right. Please go ahead, Doctor.

Mr. Gordon: Do you think I have to lead the doctor?

Mr. Sellick: No, no, but I think he doesn't need your help.

The Deputy Director: Go ahead, Doctor.

The Witness: The heart on the left side.

By Mr. Gordon:

Q. That is item 13? (79) A. Yes, sir. The atrium contains increased amount of dark fluid, blood and clots.

The mitral valve is one-and-a-half fingers, not sclerosed. Some of the whitish-yellow plaque formation on the anterior leaflet—that's the anterior—that's the leaf of one of the valves.

Q. Will you please take the first item of the atrium, "Contains increased amount of dark fluid, blood and clots, not sclerosed," and tell us what that means and what the significance of that finding is? A. Again, the left-upper chamber here, like the right-upper chamber shows that the blood was able to get there, but then apparently it couldn't get through for some reason or other, usually a blockage of some sort or mal-functioning, lower chamber, which was not able to eject the blood out quick enough to take care of the overload, so that both the right-upper chamber and the left-upper chambers show an increased amount of blood, more than the capacity required.

Q. What is the significance of the words, "Not sclerosed," with reference to the atrium on the left side, item 13? A. That is in reference to the mitral valve.

Q. Mitral valve. (80) A. A sclerosis of the mitral valve occurs in many cases—arteriosclerosis, in aged individuals, or it may occur in individuals who have had rheumatic heart disease for many years and does not indicate that the mitral valve had any old damage to it. Usually the mitral valve is one of the most important valves or commonest valves involved in rheumatic heart disease and consequently sclerosis of this valve occludes as a result of the sclerosis.

Q. Here, you say there is no sclerosis? A. There was no sclerosis. There is some soft whitish-yellowish plaque formation on the anterior leaflet. Chordae tendinae are thin. Now, the soft white-yellowish plaque formation on the anterior leaflet falls in with the age group of the individual and also with the fact that it is not uncommon to find in this age group arteriosclerosis which occasionally

can be detected even on the mitral valves, but it is a different type of process which occurs. There is a deposition of a whitish-yellowish fatty substance which becomes hardened and therefore gives us this whitish-yellowish plaque. The chordae tendinae are thin. These tendinae are small, fleshy tendons. They are like elastic bands which keep the valves from either going too far above or below during (81) the contractions or flipping action. They are free and clear. If they are thickened and sclerosed, we would imagine that they would have had diseases of long standing. There is a small amount of soft plaque formation on the aortic cusps. Now, the aortic cusps are valves of the aortic vessels and they prevent the blood which is ejected from going back into the heart. They are sort of safety valves and the fact that there is a soft plaque formation upon there indicates again probably in the realm of arteriosclerosis because this is one of the common sites of arteriosclerosis. The valve otherwise is free and clear and the endocardium is free and clear. The myocardium, which is the muscle itself of the heart, is described here as being flabby and dark red and not thickened. It measures about eleven millimeters in width. Now, a dark red, of course, flabby myocardium means that the muscle itself has lost its resilience and its color, is that difference than that of beefy red. We associate that a beefy red color is a normal color for the myocardial tissue. When the myorcadial tissue becomes dark red it shows that injury has occurred, or disease, and the miocardia—the muscle itself being flabby, shows that the muscle lost its toneness, and lack of tone ess is due to any disease (82) of the heart muscle itself. The heart weighs 350 grams or "g" period, and may indicate to be within normal limits.

Q. What is the expression under No. 13, just before the weight of the heart is, where it begins, "No areas—"

A. "No areas of scarring or softening." I inadvertently

omitted that. That means there is no evidence of any old injury to the heart by scarring and we know scar is due to old injury and no isolated or no areas of softening to indicate any diseased process in any focal or isolated area.

Q. Is that of importance in the consideration of this case? A. I think so.

Mr. Gordon: All right, sir.

Mr. Sellick: May I have it clear, are you talking about the whole heart, now, or——

The Witness: No, the left chamber. The left ventricle.

Mr. Sellick: Oh.

The Witness: It was collapsed, heart, left side.

Mr. Gordon: All right. You have answered it.

Mr. Sellick: I know.

(83) Mr. Gordon: Now, is counsel going to interrupt in the middle of direct examination with questions to the doctor?

The Deputy Director: Proceed.

By Mr. Gordon:

Q. He is referring to item 13, the heart, left side; isn't that correct, Doctor? A. That's right.

Q. As it appears in the autopsy protocol? A. That's right.

Q. Each item you are taking up separately; are you not? A. (Witness nods head affirmatively.)

Q. So that there will be no misunderstanding, I will direct you to the item and article. Item No. 14, captioned, "Aorta." Directing your attention to that, will you please read that and explain it? A. The aorta is defined as the great arterial vessel which carries oxygenated blood from the left side of the heart or from the left ventricle, carries it up into the chest to about the level of the neck and then

backwards down along the vertebral column and shoots off branches to all the organs of the body which need arterial blood. Now, there is a moderate patchy, soft white plaque— (84) patchy white formation. This is merely a statement to indicate that there is a process in which changes typical of atherosclerosis has been going on and in which there is a deposition of fatty substances and calcium and the formation of plaques with these substances along the ascending portion of the aorta.

The ostia are openings which supply—the openings to the coronary vessels which supply the oxygen to the heart muscle and blood to the heart muscle. Their openings are here at the base of the aorta near the heart. They are slightly compromised. That means that the opening is not absolutely complete, but it is partially opened.

Q. And that is indicative of what, with the ostia slightly compromised? A. Well, it indicates some process which has been going on to close the artery opening partially.

Q. Now, item 15, the "Coronary Arteries" caption, will you explain that, sir. A. I have previously explained that the coronary arteries were arteries which supply the heart in the front and in the back of the heart and in the base of the heart. They arise from the aorta. They carry oxygenated blood to keep the vitality of the heart musculature. Now, (85) "Moderate to severe, eccentric and concentric thickening throughout with calcification."

Q. What does that mean? A. This means that there is occlusion—a partial occlusion throughout the entire course of the coronary arteries with calcified—calcified substance, and this deposition is placed so that the hole is left open or left partially open. It may be in the center or it may be off the center so that we have eccentric deposition and concentric thickening. In other words, the opening of this artery has, over a period of time, by the process of

atherosclerosis and/or arteriosclerosis caused an occlusion of the opening so that it was centrally placed or eccentrically placed.

Now, "One area of complete occlusion in the upper left anterior descending branch——"

Q. You have just read that. A. No, I haven't read that yet. I am reading that now, Mr. Gordon. "One area of complete occlusion in the upper left anterior descending branch." This means that that artery is now completely occluded.

Q. This is upon death, of course? A. This is a post-mortem.

Mr. Sellick: I think that——

(86) The Deputy Director: Proceed.

The Witness: "Another area of occlusion in the large branch of the circumflex near its origin." This is a small branch of either the right or left coronary. It depends upon which one it is. It is not accurately stated here, but the purpose of the statement is that this small branch of the coronary artery which comes around the aorta has been occluded. There are no thrombi. A thrombus is a blood clot and the statement is that there are no blood clots.

Q. Item 16, "Left hilum-bronchi pulmonary vessels and bronchial nodes." The left hilum is the entrance of the lung where the arteries enter and leave the lung field and also the airway. The bronchial tubes go in at that point. That's the point of entrance and exit.

Now, the large bronchi, that is, the airways, contain a moderate amount of stringy, aspirated blood-vessels and nodes are free and clear. Now, blood from bronchi, stringy, aspirated blood, means that this blood was blood which was sucked into the lung field from the surfaces above the lung

field and presumably the blood occurring in the trauma and laceration of the upper lip.

Q. No. 17, item, left lung. A. The left lung, of normal volume and of normal (87) weight. The weight is 400 grams; dark blue-gray surface; dependent congestion. No pus or consolidation. Now, the volume apparently is normal, so that we neither had an abnormal lung, as far as any pulmonary disease due to contraction or due to expansion. The dark blue-gray surface is a normal coloring to the lung fields. Dependent congestion indicates that there has been a damming back of the blood in the base or the lower portions of this lung, of this left lung. There is no pus to indicate any infectious process or consolidation to indicate any pneumonia either recent or old.

Q. Doctor, are those findings upon autopsy of the left lung of any significance in cardiac failure? A. Yes, sir. I think it fits in with the picture of the congestion in the right atrium because, as I said—right atrium and left atrium—as I said before, the blood is pumped from the right side of the heart into the lung fields and then it is picked up by the left side of the heart and ejected out of the body. If there is an—in congestion of dependent portion of the lung, it is due to the fact that the left atrium being already congested, cannot pick this up and therefore dammed it back.

Q. Threw it back? (88) A. Threw it back into the lung, the right——

Q. I meant to ask you, under item 16 of the left hilum, is that of any significance in this case? A. Well, I think it indicates that the blood was not—was aspirated rather than exuded from the lung fields itself, or that there was any trauma to the lungs where blood could be thrown into the bronchial tubes.

Q. Do these findings have any bearing—can you tell us from these findings, Doctor, under the left hilum, item 16,

which you have read, can you tell us whether those findings indicate a lung death? In others words, a pulmonary occlusion edema, or anything like that?

Mr. Sellick: If your Honor please, I object. I think this question should be whether or not—not whether they do. It is leading for the doctor. I have no objection to the doctor testifying.

Mr. Gordon: I can't see that that is an objection, your Honor. I'm trying to get this down to a point where it will be clear.

The Deputy Director: What is the significance of that on the question?

Mr. Gordon: Item 16.

The Deputy Director: Lung congestion, Doctor?

(89) The Witness: The congestion here is due to the congestion in the left-upper atrium or left chamber of the heart.

Mr. Gordon: That's item 17. I want you to tell us about item 16.

The Witness: 16, the blood that is aspirated comes from the mouth and not from the lung.

By Mr. Gordon:

Q. I see. Was there a sufficient amount—strike that. Does this finding under item 16 indicate that the moderate amount of stringy aspirated blood produced any pulmonary occlusion or edema caused death, here? A. No, sir.

Q. Now, item 18, "Right hilum." A. That's the same as the left hilum, sir.

Q. Item 19, "Right lung." A. Weight, 450 grams. It's normal.

Q. What else is there under item 19? A. Well, it would be the same as under item 17.

Q. It says, "do," meaning "ditto." A. That's right, meaning dependent congestion, no pus or consolidation.

Q. Item 20, "Thoraic cage and parietal pleura." What is the thoraic cage and parietal pleura? (90) A. The thoraic cage is the space which contains the lung—the lung fields, the lung, the heart and the mediastinum, which I defined before. It is made up—the thoraic cage is actually—almost can be called a cage made up of ribs and the flesh between the ribs and the surface of the ribs which are covered by muscle fascia and tissues which protect the inner contents, that is, the lung fields, the heart and mediastinum and the great vessels.

Here, the parietal pleura is the inner lining of this cage. Again, it is a smooth, glistening lining and, according to the statement here, it is free and clear.

Q. Now, "Abdomen," which is subdivision 2 of the protocol, captioned "Abdomen." Contains under that item, beginning with item 21, "Spleen," would you read item 21, please? A. The spleen is of normal size and configuration, a dark bluish-gray surface which is smooth. This is a normal appearing spleen. Dark red on section with normal markings. This again is a normal appearance when sliced with a knife, so the spleen can be said to be normal.

Q. Now, item 22, "Left suprarenal." (91) A. The suprarenal glands are also known as the adrenal glands. They are free and clear. They lie on the upper poles of each kidney and apparently they show no disease.

Q. The left kidney, item 23, captioned "Left kidney." Read that to us, please. A. The left kidney is normal size and configuration; the capsule strips with ease; in other words, the fine layer of skin over the kidney strips with ease means that there is nothing underneath it holding it, no diseased process which might have caused the scar to be formed and a good healthy kidney will strip very well. An abnormal kidney which is diseased or chronically ill will have the—the operator will have difficulty in

stripping the kidney surface of its capsule—reveals a smooth dark purple surface. Normal cortico medullary ratio. "Normal cortico medullary," is the surface which is dark purple, which is characteristic of a normal kidney in that particular layer. Now, the normal cortico medullary ratio, there is a ratio in which the cortex or the medulla, that is, the outer surface of the kidney and the inner surface are apparently normal, here, indicating that there is no abnormal process in the various levels of the kidney in its function. The pelvis is free and clear. (92) The pelvis is the lower portion of our abdomen or belly below the umbilicus, which is encased by the bones of the hips and this is apparently normal. I beg your pardon—I have that—the pelvis here means pelvis of the kidney, which is the opening in which blood-vessels enter and leave the kidney and the ureter or the tube which carries the urine from the kidney to the bladder exits from this point. This is known as the pelvis. This is free and clear and apparently normal. The weight is 150 grams which is within normal limits. The right——

Q. Item 24, "Suprarenal." A. The right suprarena is again the right adrenal gland and this is again, the same as the left, which is normal.

Q. Item 25, "Right kidney." A. The right kidney is the same as the left kidney, normal.

Q. Doctor, subdivision 3 of the protocol, item 34, captioned "Scalp." A. There is no evidence of old or recent injury to the scalp. The scalp is the covering of our head from above the eyes to just a little bit above the eyes to the back of the head and it is made up of five layers (93) of tissue and there is no evidence of any recent or old injury here and so, therefore, the scalp is normal.

Q. Item 35. A. "The calvarium." That is the bony layer just beneath the scalp. It is the bony tissue. It covers the brain and it is slightly thinner than normal and there are no fractures.

Q. Item 36, "The dura matter." A. The dura matter is the layer of tissue or, let's say, the skin which lies just beneath the calvarium and protects the brain from injury from above.

Q. What is the finding there? A. This is normal, free and clear.

Q. No. 37, "Cerebrum, pia-arachnoid, cortex, parenchyma, basil ganglia, ventricles and basal vessels," captioned under item No. 37. What is that? A. The "cerebrum" is the upper brain and the pia-arachnoid is a very thin tissue of a clear, smooth color, glistening, that lies immediately over the brain, and the paranchyma is described as the brain tissue itself. The basal ganglia are the exits of some of the main trunks of nerve fibers from some of the brain centers. The ventricles are the cavities of the brain. There are four. There is two in the cerebrum, one right and one (94) left, and then there is one in the third portion of the brain and one in the fourth portion of the brain, and the basal vessels are the blood-vessels beneath the brain which branch upward and supply the areas of the brain. The brain——

Q. Just a minute, Doctor. A. Sorry.

Q. I believe that after the word "pia-arachnoid," the caption, comes the word "cortex." Will you explain what that is, please? A. The "cortex" is the upper layer of the brain which has a distinct color different from the layers beneath it. It is a very thin layer in which reside or are found the nerve cells that promote all functions of the body. They are the nerve centers.

Q. Will you read to us what the findings were under item No. 37? A. The brain well fills cranial cavity. No odor; no oedema; normal markings. This means, apparently, there was no evidence of any disease. "No hemorrhage; areas of softening or cavity formation." That means that there has not been any rupture in the vessels.

There has been no disease of the brain itself or any distortion or invasion of the cavities; that is, the (95) brain cavities, the ventricles, or cavity formation, meaning that probably indentation by some disease process or injury.

Q. Was there any cavity formation? A. None.

Q. All right. Continue. A. The vessels are somewhat small and thin with slight amount of patchy sclerosis. Again, here we have this process of sclerosis or atherosclerosis observed in the thin vessels of the brain.

Q. No, 38 item, "The Pons cerebellum and medulla." A. The "Pons" is a temple defining the junction of the lesser brain, the smaller brain with the large brain. It is a bridge which connects the two and the cerebellum is the small brain and the medulla of the cerebellum is the inner portion of the small brain. This is free and clear, therefore indicating a normal Pons cerebellum and medulla.

Q. Do any of these areas of the brain house a cardio-respiratory center which regulates the heart and lungs? A. Yes, sir.

Q. In item 38? A. Yes, sir, the medulla houses the cardio- (96) respiratory center.

Q. Well, does that cardio-respiratory center house the medulla—regulate the heart and lungs? A. Yes.

Q. In lay language, would you compare the cardio-respiratory center, thus regulating the heart and lungs as the main switch?

Mr. Sellick: If your Honor please, I think the doctor should tell us.

The Deputy Director: That's right.

By Mr. Gordon:

Q. Well, will you tell us how? A. The cardio-respiratory center is an area of tissue in the medulla, which is controlled by various mechanism—controlled by other neuro-

fibers from the other portions of the brain. It is controlled presumably, and most markedly, by changes in carbon dioxide levels in the blood, so that many times an acid blood will cause a change in respiration and heart rate or an alkaline—on the alkaline side, a change in heart rate and breathing rate will be manifested. It is also effected by blood-vessels which go to this area and supply tissue, nutrient, and therefore if these blood-vessels carry any disease to this area, respiration (97) and the cardiac rate will be altered, as we see, in all diseases because of its effect upon the cardio-respiratory center.

Q. Well, here, these vessels, the Pons cerebellum and medulla were free and clear; is that correct? A. Yes, sir.

Q. Now, No. 39, captioned "Skull and accessory sinuses." Will you tell us what the findings were on that? A. The findings under "sinuses—accessory sinuses and skull," were no fractures, free and clear. Normal accessory sinuses and skull sinus.

Q. Item No. 40, "Spine and spinal cord," Doctor. Will you tell us what the findings were under that and explain it? A. The spine is the portion of bony structures—they're equivalent to, let's say, small blocks that sit one upon the other. From the base of the skull down to the tailbone, and this envelopes or closes—encloses a series of nerve fibers equivalent to a cable in the electrical distribution of energy. As to that, the cable can shoot smaller branches into the body organs and tissues for nerve impulse. It was shown here that there were no fractures—I beg your pardon. It showed (98) that the anterior surfaces, dorsal and lumbar vertebrae, were free and clear, so that apparently there was no injury to the spinal column.

Q. You started to read "No fractures." You were not referring to any statement in item 40 when you said—"I beg your pardon," but No. 39; is that right? A. Yes, sir, that's right.

Q. Now, subdivision No. 4 of the protocol, headed "Organs of the mouth and neck," No. 41, "Buccal cavity, nasopharynx and esophagus."

Will you explain the meaning in the phraseology in the caption, Doctor, and then give us the findings? A. The buccal cavity is the space which is bounded by, let's say, the lips in the front and the cheeks on the side; the palate up above and the tongue in the floor of the mouth and the bottom. This is designated as a buccal cavity. Now, the nasopharynx is the portion of the throat which goes up into the back of the head and joins with the airways from the nose. That's known as the nasopharynx. The pharynx is another term for throat. The esophagus is the portion of the throat and consists of a tube which runs down to a portion of the stomach. "For lip laceration and hemorrhage see No. 4." This has been described (99) previously in which he had a laceration of the upper lip in mid-line.

Q. Will you turn to item 4 again? A. Yes, sir.

Q. Incorporated not by reference here, but incorporated on No. 41. Well, it is lengthy. Where it says for lip laceration and hemorrhage it says, "See No. 4." Will you explain to us what is referred to in item No. 4? A. In item No. 4, they are particularly—the item referred to is three-quarter inch laceration of the inner surface of upper lip in mid-line. Moderate amount of stringy blood in mouth and throat and flecks and streaks of blood—dry blood, around the mouth; also, upper and lower full plates. Upper central incisors are chipped and a fragment is lying loose under the lip.

Q. Where is the reference to "hemorrhage" in No. 4? A. I think that means the stringy blood and the laceration.

Q. Was there a hemorrhage as found? A. As stated here, I do not agree with this statement. I think we have other terms for "hemorrhage." That doesn't qualify and fulfill the criteria of the term "hemorrhage."

(100) Q. No. 42. A. 42 is the "larynx, trachea and thyroid." The larynx is the voice box from which we emit sounds and voices, and the trachea is the tube from the voice box which goes down and divides into two tubes, the right tube going to the right lung and the left tube going to the left lung. These are known as bronchi, so this is a passageway connecting the voice box with the bronchi that go into the lung. It's an airway and the thyroid is a gland which is just alongside and beneath the Adam's apple, and here, apparently, there is no notation here made of their description in No. 42.

Q. Doctor, can I see the original autopsy that you have been reading from? A. (Doctor presents report to Mr. Gordon.)

Q. All right, sir. Now, were there any findings under item 42? A. No, sir.

Q. Now, subdivision No. 5 of the protocol, captioned "Bones and Joints," No. 43. "Bone marrow, bones and joints." Any findings under item No. 43? A. There are none described here, sir.

Q. Are there any other findings, any other items after No. 43, I don't seem to have? A. I don't see any here, sir.

(101) Q. Do you have anything further on this? A. No, I have nothing further, sir.

Q. Now, Doctor, have you completed reading the autopsy protocol? A. There was one other statement on the first page—or the last page here, the toxicological report by Edel Laboratories, indicating that a toxicological examination was made on the brain. In other words, it was a series of tests that were made on brain tissues to determine if any poison had penetrated the brain tissue. The result was there were no volatile poisons—that is, no gassy—that is, gaseous poisons or gas poisons were detected.

Q. Doctor, having read or interpreted the autopsy as you have, can you tell us what kind of a death we are deal-

ing with in this case? A. I think in a review of this autopsy report and in the process of elimination of various organs, we—that is, I can say with certainty that the organ of note here is the heart itself where all the pathology for the cause of death seems to lie, within this particular organ, and it is very obvious from the coroner's autopsy report that this heart had suffered an acute damaging process.

Q. Now, Doctor, I am going to ask you a hypothetical (102) question which, of necessity, will be quite lengthy. Maybe, before I do that, your Honor, it being five minutes to one, would you rather we did not undertake it now and came back at two o'clock.

The Deputy Director: Yes.

(Trial adjourned for lunch.)

(Trial resumed after the luncheon recess.)

The Deputy Director: Would you read the last question back, please.

(Last question read back by the reporter as follows:)

"Q. Now, Doctor, I am going to ask you a hypothetical question which, of necessity, will be quite lengthy. Maybe, before I do that, your Honor, it being five minutes to one, would you rather we did not undertake it now and came back at two o'clock?

DR. MICHAEL RITOTA, having previously been sworn, resumed the stand and testified further as follows:

The Deputy Director: Proceed.

Direct examination by Mr. Gordon:

Q. Doctor, you can take notes, if you want to. Do you have a pencil? A. I have a pencil.

(103) Q. Now, Dr. Ritota, I am going to ask you a hypothetical question, at the end of which you will be requested to give your opinion as to whether there is any causal relationship between the death of the petitioner's decedent and his operation of a bus on February 2, 1952, for the Public Service Coordinated Transport.

Now, in connection with this hypothetical question, Doctor, you will assume a man in the person of petitioner's decedent, Harry Kream, who was born August 10, 1900, and at the time of his death on February 2, 1952, was fifty-one years five months and twenty-three days old, and you will assume further, Doctor, that prior to the 2nd of February, 1952, that this man, Harry Kream, had worked for some number of years with the Public Service Coordinated Transport as a bus driver; that he did not suffer from any illnesses or sickness other than occasional colds prior to February 2, 1952, and during his married life to the petitioner, which extended some period of three years and then occasionally, when he had colds he would come under the treatment of a doctor. Now, Dr. Ritota, you will assume further that his regular occupation was that of driving a bus for the Public Service Coordinated Transport and that his driving the (104) bus was generally in and about the City of Newark and perhaps some of the smaller municipalities in Essex County. Now, you will assume that on February 2, 1952, in the forenoon of that day the petitioner's decedent who had gotten to the terminus of the bus

that he was operating at Military Park; made a telephone call to the station-master of the Public Service Coordinated Transport Company at the 16th Avenue garage of the Public Service to a Mr. Fred Ulbrich, who was his boss and who was the station-master of that particular garage.

If your Honor will excuse me, I was looking at my own transcript of the Essex County Court and I didn't have it as detailed as Exhibit P-3, which I will now refer to.

You will assume that this bus garage was actually at 20th Street and 16th Avenue in the City of Newark, not at the street that I gave you, and that the station-master of this garage and the man who was Harry Kream's superior or boss was Mr. Fred Ulbrich. Now, you will assume that the telephone call came in to Mr. Ulbrich from Harry Kream who was calling from Military Park some time between 11:00 and 11:30 a. m. on the morning of February 2, 1952; that Mr. Kream told Mr. Ulbrich that he was ill. He told Mr. Ulbrich that he had been (105) sweating and that he had the chills. Mr. Ulbrich then informed Mr. Kream that he would send a man to relieve him at 14th Avenue and 16th Street or 19th Street in Newark, and the decedent thereupon drove his bus,—this was a Saturday morning—through the streets of Newark from Military Park where he made the call to 14th Street—to 14th Avenue, and where he was met by the relief bus driver who had been sent to that point to relieve the decedent by Mr. Ulbrich. This bus driver was Edward J. Wayda. You will assume that Mr. Wayda testified as appears in Exhibit P-3 in evidence, a transcript of the proceedings containing his testimony which was at the Essex County Law Division, and you will assume that Mr. Wayda testified that he walked over to 19th Street and 14th Avenue to meet this bus that the decedent was bringing; that it was a three-minute walk that he took from the garage to where he was to meet the bus; that he waited until the bus got there;

that when he approached the bus that Kream was in, Kream was sitting in the bus; that Kream walked out of the bus while he, Wayda, stood right at the step; that when he saw Kream walking out of the bus and observed him, he told Kream to call up the company and have someone drive him, Kream, home in his car because he noticed he was sweating, and this (106) was in February. The sweat was coming out on his brow and he was outside of the bus when he saw this. He stated that he told him to call someone up and—at the company and have a company man drive him, Kream, home in the car because he knew that Kream had reported in ill, having been told this by Mr. Ulbrich when he sent him to relieve Kream. He stated that the only thing which he observed was the perspiration from Kream's forehead when he relieved him at 19th Street and 14th Avenue, but he would not say that the decedent was well except for that perspiration and he said that the decedent looked sick to him.

Now, you will assume further, Doctor, that Mr. Wayda then took his bus which he had relieved the decedent in and Mr. Kream then started to drive towards his home at 374 Seymour Avenue in the City of Newark; that as he, Kream, was driving his car along Hawthorne Avenue in an—I believe, westerly direction——

The Deputy Director: Easterly direction.

Mr. Gordon: Easterly direction, near Leslie Avenue——

The Deputy Director: Leslie Street.

Mr. Gordon: Leslie Street, that suddenly his car, Kream's car, was seen by a man driving his (107) own car in back of Kream's car; suddenly Kream's car was seen to veer and careen to the left and crossed the left side of the street from the right side where they were driving up to the curb, mount the sidewalk; go across a plot where there were hedges

and strike a retaining wall, but the impact was described by the witness who was in the car behind Mr. Kream's as not being a heavy impact; the force of the Kream car having been broken by the hedges he had had to go through to hit the retaining wall, and you will assume that obeying human instincts, the man driving the car behind the Kream car stopped his car; went to the assistance of Mr. Kream; found him bleeding from the mouth; observed, as he thought, Mr. Kream was trying to say something to him; his lips were moving; Kream was lying down wedged on the floor of the car in the front seat; the man couldn't speak, although the witness tried to hear what he was saying, but he couldn't make out any words, and that in a matter of three minutes, the motions of the decedent's lips ceased and in about five or ten minutes before the police came, the witness stated that at the end of five minutes or so the man seemed to him, as a layman, to have (108) passed away.

Now, Doctor, you will assume that the decedent was removed to Mullin's Morgue in Newark and that an autopsy was performed on him at about 2:45 p. m., some two hours after his death on February 2, 1952; the body being still warm when the autopsy was performed and there was no setting in of rigor mortis.

You will assume, Doctor, that all of the findings which were made on autopsy, as set forth in Exhibit P-2 in evidence, which you have read, considered and interpreted for us today on the stand.

Now, Doctor, you will also assume that the death certificate, P-4 in evidence, after stating that the man died, states: "Motor vehicle accident; collision of

pleasure car, building and driver, occlusive coronary arteriosclerosis," is given as the medical cause of death and there is a statement that there was a laceration of the lip.

Now, Doctor, considering those facts, sir, do you have an opinion as to whether the operation of the bus by the decedent from Military Park in Newark after he called up to be relieved or to report that he was sick had any relationship with (109) his death? Do you have an opinion?

A. Yes, I do, sir.

Q. Now, will you please, Doctor, state for us what that opinion is? A. If I can take the opportunity of just a little bit of time, I'll try to give this as briefly as possible.

Q. No. You take all the time you need. No one is hurrying you. A. In answering this hypothetical question presented to me, I think there is no doubt that the protocol presented by the Coroner gives a definite and conclusive diagnosis as a primary cause of death being coronary arteriosclerosis, severe and occlusive. Therefore, in giving an opinion and in answer to this hypothetical question, we have to work in a sense of retrospect and follow the course of events from which they started until the point of terminus here. We will have to assume that this man at about 11:00 or 11:30 a. m., when he called in, was in a sense of a state of illness whereby it set up an alarm reaction in him and he wished to notify his boss that he was not feeling well, and having called in, he stated that he was ill and sweating and having chills. This was at the Military Park Station. Now, sweating and chills can be the cause of a variety (110) of diseases and infections. However, to precipitate sudden death, they must involve cardiovascular disturbance, as cardiovascular collapse, and I don't think or know of any chills and fever without any pathological findings other than what was given in this report——

Q. Excuse me, Doctor, you said "chills and fever." A. Chills and sweating, other than the pathological findings found in this report can be attributed to that which is given here. Now, the sweating and chills apparently at Military Park, in retrospect, are merely the evidences of onset of cardiovascular collapse and disturbances.

When he arrived at the 14th Avenue and 19th Street Station, an observer noted that he was still sweating at that time and that he had been notified to, or that it was suggested that he be given a ride home by someone. Now, the sweating at this phase indicates a prolonged cardiovascular collapse, or an infectious disease. When he drove his car home and the car careened off to the side suddenly, this had to be a stage of shock or a severe fulminating infection, or a severe cardiovascular collapse in which the brain would lose its control and thereby losing muscular control and the car would careen off the road through (111) the hedges and hit the wall.

Now, at the time of the stopping of the car, he had a laceration on the lip and the bleeding that occurred therefrom was not of a severe hemorrhagic nature. In order to have a hemorrhage, you should have at least a loss of one pint of blood acutely and suddenly. This did not occur, apparently. Now, we have to consider two—three possible things here, such as an acute infectious disease and cardiovascular collapse in looking over the protocol, there is no evidence whatever of any organ of the body, of either the brain, the lungs, the bowels, the kidney, or any of the organs, except the heart, would show any changes. There is no evidence from the protocol that this man died of any acute infection and therefore that can be eliminated; even a fulminating infection, if it were fulminating, the pathology would be so great and so acute as to show some changes in some vital organs; secondly, from the report, it can be seen that there was no cause of death as the result of

trauma, so we can eliminate trauma as being the cause of death. Therefore, we have to return to the presumption that the initial sweating and chills and the continuity of the sweating and the chills along his travels up to (112) 14th Avenue and 19th Street from the time that he left Military Park, that these chills and sweating was the result of vasomotor disturbances or cardiovascular collapse, and the suddenness and acuity of the situations leads us to analyze the situation of the heart and the lungs.

As I have mentioned before, in the analysis of the protocol, the lungs in both bases showed a congestion due to a cardiac failure, a backward type of a failure in which it was unable to pump the blood ahead and therefore congested backwards into both auricles and into the lung fields. Then, further analysis of the report, it shows that this heart musculature was flabby and dark red and that he had two coronary vessels which were occluded. Therefore—therefore, this heart was no longer able to meet the demands set upon it during the time of the initial attack; that is, the sweating and chills at the Military Park up to the time of his death, and constant aggravation and load work upon the heart from the onset of his symptoms to the end were an imposition upon this heart of a great degree, so that from the retrospective type of analysis and from the final report of the Chief Medical Examiner's protocol, I can state with certainty (113) that this man had died from coronary arteriosclerosis of a severe and occlusive type from the time that he complained about himself at Military Park until the time of death when his car ended in a crash.

Q. Well, to be more specific, Doctor, in the hypothesis, you have had laid before you that from the time he complained of chills and sweating at Military Park that he drove his bus through the city streets of Newark to that place where he was relieved by Mr. Wayda, when you say

that the heart was unable to take it, just what do you mean? A. That any situation between the time that he had the initial chills and sweating until the time of death were an imposition and a load upon the heart. No matter what he did do in that period of time, like walking or driving a bus or any exertional activity was an imposition upon that work load of the heart.

Q. Do you know about how far it is from Military Park to the place where he was relieved; are you familiar? A. I think I am.

Q. With those street? A. I think I am. That's 14th Avenue and 19th Street.

Q. He was relieved at 14th Avenue— (114) A. That's about two to three miles, if I'm not mistaken—19th Street and 14th Avenue.

Q. 14th Avenue and 19th Street from Military Park, about how far is that, would you say, approximately? A. Well roughly, I'd say about two to three miles.

Q. Now, is the distance—if it develops that it is a mile or mile and a half, does that particular distance bear any significance with regard to his driving the bus in the condition that you say he was in? A. I think it does, sir. I'm certain that in my knowledge and practice and experience, in coronary artery disease, I would just as soon as not have these patients move in bed even when they're in bed.

Q. So that were he to drive five blocks or five miles, driving a bus as he was doing, with his heart in the initial stages as it had gotten into, failure down at Military Park, it is your opinion, sir, that that was a contributing factor to this man's death; is that correct? A. Yes, sir.

Mr. Gordon: Cross examine.

Dr. Michael Ritota, for Petitioner—Cross.

Cross examination by Mr. Sellick:

Q. Do you know the particular streets that this (115) bus travels on, Doctor? A. I don't know the particular streets, sir. I have an idea of these locations because I many times have traveled from Military Park to 14th Avenue and 19th Street and I don't think it makes much difference whether you go up one avenue or not. They are all pretty much the same, whether you go up South Orange or Central Avenue, maybe a difference of a half mile or a mile, but that's why I allowed myself two or three miles.

Q. As I understand from the last part of your testimony, that you said that if this man were your patient in this condition that you have discovered on autopsy, you wouldn't even like him to move in bed; is that right? A. Yes. I assume that if the patient were definitely diagnosed as a coronary and he were put to bed, I'd even restrict him from extra motion in bed.

Q. So this body, as you got it from the autopsy, was in such condition that he shouldn't even walk or do anything; is that right? A. That's right.

Q. So that medically, if this man didn't do anything, he could have died; is that right?

Mr. Gordon: I object to that, if your Honor (116) please, under the case of *Ciewiercz* vs. *Public Service,* the Supreme Court in an expression by Mr. Justice Persky said, "The mere fact that this man could have died in bed, could have died while he was performing a physical function in the bathroom; could have died while he was eating a meal, was entirely immaterial because it was a supposition, circumstance." Therefore, I object to the question.

The Deputy Director: All right. Cross examine. Go ahead.

By Mr. Sellick:

Q. Doctor, if you had no difficulty, except on autopsy, would you have any difficulty attributing the man's death to the conditions in and of themselves?

Mr. Gordon: I object.

Mr. Sellick: I'm just asking—restricting it to the autopsy. Would you repeat that, sir?

(Last question read back by the reporter, as follows:)

"Q. Doctor, if you had no difficulty, except on autopsy, would you have any difficulty attributing the man's death to the conditions in and of themselves?"

Mr. Gordon: I think that's obscure.

Mr. Sellick: I will withdraw it if you have (117) nothing before you in the case except your findings on autopsy, the severe arteriosclerosis and the condition you found in the heart and other parts of the body, would you have any difficulty in attributing the man's death to the physical conditions that were within the man's body itself?

The Witness: I would want to know what that man did before he died.

Q. Medically, you would like to get into the factual situation; is that right? A. That's right, yes, sir.

Q. Medically, you couldn't give an answer if you were asked? A. I could, that he died of coronary artery disease, but I can't say what caused it.

Q. Wouldn't coronary artery disease in and of itself cause death? A. No, sir.

Q. Never does? A. No, sir.

Q. In your opinion, coronary artery disease in and of itself would never cause death? A. Right, sir.

Dr. Michael Ritota, for Petitioner—Cross.

Q. Do you have a cure for coronary artery disease? A. No one else has, either. The point is, this— (118) may I clarify my statement? I am certain that the majority of people that walk around over the age of forty have coronary artery disease and many of them die at old age, even with that coronary artery disease, but it depends upon the degree of the disease, the rapidity and the amount of occlusiveness that causes it. Coronary artery disease per se does not kill men and I quote you from White's work——

Q. Just a minute.

Mr. Gordon: Just a minute. He has a right to give his opinion—Paul White.

The Witness: Paul White is the dean——

Mr. Sellick: If he is going to quote some authority, let the authority get up on the stand and be cross examined.

The Deputy Director: Sustained.

Mr. Gordon: This is cross examination.

The Deputy Director: The doctor has mentioned —that's all right. Next question.

By Mr. Sellick:

Q. Well, you told us, I think, in your direct examination that this man had a severe case of coronary artery disease; didn't you? A. Yes, sir.

(119) Q. What are the medical benefits of a severe case of coronary artery disease?

Mr. Gordon: I object to that. That's entirely immaterial.

The Deputy Director: What are the benefits?

Mr. Sellick: Medical benefits. I want to know the medical benefits.

Mr. Gordon: That's entirely immaterial.

Mr. Sellick: I want to know the medical benefits from it. Here is an expert doctor here——

The Deputy Director: Let the doctor answer.

The Witness: I don't understand your question very clearly.

By Mr. Sellick:

Q. I'd like to know what benefit a patient with severe coronary artery disease obtains in and of itself from that disease; that's all I want to know? A. Well, I don't think you can get a benefit out of any disease.

Q. You think it is a detrimental condition? A. I certainly think so. I think any disease is detrimental.

Q. Why is it detrimental? A. Because it imposes first of all, it imposes (120) upon the general functional capacity of the individual if it is bad enough and I'm certain that it imposes upon his longevity, upon the longevity of the individual.

Q. You think it is a detrimental situation, not a beneficial one? A. Absolutely.

Q. Doctor, if you were called on the telephone and the patient told you that he was sweating and had chills, could you diagnose the condition as a coronary artery disease over the telephone?

Mr. Gordon: Just a minute, I object to that. That's entirely immaterial. We don't care in this case whether it was correctly diagnosed.

The Deputy Director: Sustained.

Mr. Sellick: Well, your Honor—well, your Honor, in his answers there, he put a lot of weight on that.

Mr. Gordon: He said, taking it in retrospect following with the events that came after.

The Deputy Director: There is a little more in the record.

Mr. Gordon: Certainly.

Dr. Michael Ritota, for Petitioner—Cross.

By Mr. Sellick:

Q. Now, Doctor, in giving us—you testified, (121) as I understand, up in the Courthouse on the other case; didn't you? A. I did, sir.

Q. And on the facts of that case, what did you attribute that to?

Mr. Gordon: I object to that, your Honor.

Mr. Sellick: This is cross examination.

Mr. Gordon: He may confront him with testimony that is contrary——

The Deputy Director: I don't know if the doctor made contrary statements on the same facts. Maybe I should know. All right. Do you know the question?

Mr. Sellick: Would you read the question back?

(Last question read back by the reporter as follows:)

"Q. And on the facts of that case, what did you attribute that to?"

The Witness: I said that the primary cause of death in the last presentation was coronary arteriosclerosis, severe, occlusive.

By Mr. Sellick:

Q. And those are the facts that you attributed it to up there? A. That's right.

(122) Q. No factual situation at all did you take into account up there?

Mr. Gordon: I object to that. I know——

Mr. Sellick: Wasn't he asked a hypothetical question up there?

Mr. Gordon: Yes, he was asked a hypothetical—to produce it and see if he told any contradictory

testimony. He certainly didn't, or you would have them.

Mr. Sellick: Are you stating the facts are the same here as they are up there?

Mr. Gordon: With the exception we did not include in this hypothesis that Ulbrich made him take the bus up there because we're not dealing with Ulbrich's negligence here, Ulbrich being inhuman or anything like that. That doesn't enter into this picture. What enters into it is, and I say, if the man drove it himself voluntarily, the doctor says that's the thing that brought it about, that was the contributing factor that brought about his death, driving the bus being the commencement of the heart attack.

The Deputy Director: All right. I sustain the objection.

(123) By Mr. Sellick:

Q. Now, item No. 4 in the autopsy protocol—rather—withdraw that.

On the pathological anatomical summary it says, "Primary cause of death." A. What page is that, sir?

Q. On the first page. A. Oh, yes; sir.

Q. Did you tell us that this man had a severe case of coronary arteriosclerosis? A. I think so.

Q. I think you said very severe, didn't you? A. Yes, sir.

Q. And do you deny that, medically, coronary arteriosclerosis in and of itself can cause death? A. Coronary arteriosclerosis in itself may not cause death.

Q. Do you deny that it will cause it? A. I think—I can't understand the framing of your question. Perhaps I may try to answer it in the way I have interpreted this question of yours.

In view of the fact that when an individual with very markedly advanced type of arterial disease—and yet have

no symptoms, we can have an individual with mild arterial disease and have marked symptoms. (124) In other words, the degree of it is not asscciated with the severity, but the occlusion is. It doesn't make any difference how big that blood-vessel is or how small it is, but when it is closed off, then you have definite trouble and this is my interpretation here. This is my analysis in the answer which I have given to the Court here.

Q. Have you ever, in your experience, come across a case of severe coronary arteriosclerosis in which the final symptom is death itself, medically? A. Yes.

Q. You have heard of it? A. Yes.

Q. You have heard of cases like that? A. Yes.

Q. So death itself is a symptom; isn't it? A. I think death is the end of symptoms.

Q. I think you have told us you eliminated trauma in this case; right? A. As a cause of death, yes.

Q. Looking at No. 2.

Mr. Gordon: Item No. 2, is that, Mr. Sellick?
Mr. Sellick: Yes—rather, 4.
Mr. Gordon: Item 4; item 4.
Mr. Sellick: Yes.

(125) By Mr. Sellick:

Q. Do you deny there was a head and face injury in this case? A. There was a lip injury here, laceration, three to four—three-quarters of an inch in length is the interpretation here, I presume.

Q. That doesn't mean that the head itself or face was involved, just the lip, the man stuck his lip out and cut it; is that what it means to you? A. Yes, sir.

Q. All right. Do I get that straight, now, Doctor, there was no blow to the head, as I understand it, merely that the lip must have been out and that was the only part lacerated?

A. No, there may have been a blow. That I don't know, the events that transpired, but the results of the blow are not found here. No trauma has been great enough to cause any injury to any of the vital organs as a result of the blow. The blow resulted in this laceration. There may have been bluing, there may have been blackening of the face, but there was no direct injury to the nervous system, to the brain and to the eyeballs, or any of the bones in the structure of the skull. There were no fractures, so therefore we conclude (126) that the blow must have been one of a nature in which it did not impair the central function of this individual.

Q. Do you take into account the autopsy which was made within two hours of death? A. Yes, sir, I do, very much so.

Q. Now, on No. 13, where you say—where you explain there was a small amount of plaque formation in the aortic cusp, you tell us that's a common site of arteriosclerosis? A. One of the more common sites or perhaps one of the more common sites of athero and/or arteriosclerosis as in the ascending portion of the arota. It is not uncommonly seen in the valves or cusps of the aorta blood-vessels.

Q. My question is, that small amount of plaque formation on the aortic cusp, did you tell us something about that being the common site of an existing arterioselerosis?

Mr. Gordon: I object to that. He has answered it just now. He has answered it before.

The Deputy Director: Can you answer it?

The Witness: I would say that's a rare site of it, but it does occur.

By Mr. Sellick:

(127) Q. Rare site? A. Rare—more rarely than commonly.

Q. How about myocardium flabby, is that due to disease in the next sentence? A. Yes, flabby myocardium is usually due to disease of the myocardium.

Q. Then you don't deny that this man had a diseased heart before; do you? A. I think the type of flabbiness that you see here, without the evidence of scarring and softening, indicates that this was recent in onset. The myocardium shows no disease of the past.

Q. Your interpretation of what this autopsy is now, it indicates no reason; is that right? A. No what?

Q. No reason that the flabbiness is recent within two hours? A. This is recent, yes.

Q. Does it say "Recent" there? A. No. I say this is recent.

Q. Now, on No. 14, "Plaque formation."

Mr. Gordon: "Soft plaque—"

By Mr. Sellick:

Q. (Continuing)—"Moderate patches of plaque (128) white formation." Did you tell us that's in the aorta, 14? A. Yes, sir.

Q. Does that indicate that atherosclerosis is going on? A. Yes, sir.

Q. Do you think that that existed before the particular date the autopsy was made? A. Definitely.

Q. Now, 18 and 19, the right hilar and right lung.

Mr. Gordon: That wasn't the right hilar.

Mr. Sellick: "Hilum," excuse me.

Mr. Gordon: I thought you said "hilar."

Mr. Sellick: I'm sorry. Excuse me.

By Mr. Sellick:

Q. Both of them are the same as the left hilum and the left lung; is that correct? Is that what you told us? A. Yes, sir.

Q. And any explanaton which you gave us before of the meaning of 16 and 17 would also apply to 18 and 19? A. Except the aspirated blood in No. 16, sir.

Q. Except what? A. The aspirated blood in item 16.

Q. Well, if they are the same in 16 and 17, 18 (129) and 19 would be the same; is that right? A. All right, sir, I would concede to that, yes, sir.

Q. I'm trying to find the explanation which you gave to 16 and 17, whether it would also apply to 18 and 19? A. Presumably, if that's what written, that's what it means.

Q. I am just going by your testimony. A. If I gave an explanation 16 and 17 is like 18 and 19, I'll still stand by it.

Q. Now, in reading this autopsy protocol, did you read No. 31 to us? A. I don't recall whether I—I think Mr. Gordon took up from somewhere around 16 and he eliminated 31.

Q. Well, will you tell us now? A. All right.

Q. You didn't have any reason for eliminating that? A. No, sir, I didn't.

Q. Do you know whether you did eliminate it? A. As I said, Mr. Gordon was carrying the ball then and I merely followed the items which he wished to discuss at that particular time.

Mr. Gordon: I will say for the record that I read item 31 and it was explained—"Yellow plaque formation," by the doctor.

(130) Mr. Sellick: All right. I didn't have any recollection of it, but maybe you're right.

Mr. Gordon: Can we go back?

The Deputy Director: Which item was it?

Mr. Gordon: 31, "Abdominal and pelvic cavities."

The Deputy Director: No.

Mr. Gordon: It was not mentioned.

The Deputy Director: Numbers 24, 34, 37.

Mr. Sellick: The doctor, I think, skipped a whole page of the autopsy protocol and explained what it meant to him.

The Deputy Director: He just answers questions to counsel's interrogation.

Mr. Gordon: He was answering questions from me.

The Deputy Director: All right. The next question.

Mr. Sellick: The doctor was doing more than answering questions.

The Deputy Director: Please don't argue. Proceed. You can pick this up now.

By Mr. Sellick:

Q. No. 31, there, what were the findings there, Doctor? (131) A. In the abdominal pelvic cavities, moderate amount of yellow plaque formation in the descending aorta with one area of ulceration just below the arch. No psoas, hemorrhage, free and clear.

Q. What is that, "yellow plaque formation"? A. A yellow plaque atheromatous plaque of degeneration, usually associated with atherosclerosis and/or arteriosclerosis.

Q. And going over this in connection with the other, there is no doubt that this man's body already had given signs that he had an advanved severe case of arteriosclerosis; is that it? A. Right, sir.

Q. Well, may I see that copy you have, Doctor, just for a second? A. Excuse me. (Paper presented to Mr. Sellick by the witness.)

Q. In No. 37—this patchy sclerosis also softens the vessels? A. Yes, in the vessels of the brain, I presume, here, since it is under the title "Cerebrum," there is a slight amount of patchy sclerosis.

Dr. Michael Ritota, for Petitioner—Cross.

Q. Also, as I understood your testimony in regard to No. 41, in telling us what this autopsy protocol meant, (132) you told us that there was no hemorrhage despite the fact that the autopsy protocol, Petitioner's Exhibit says that there was hemorrhage; is that right?

Mr. Gordon: There is nothing in that that shows there was hemorrhaging, nothing at all.

Mr. Sellick: This thing itself, made by the man himself, says "Hemorrhage."

Mr. Gordon: It does not say there was "hemorrhage," your Honor. I would like you to look in No. 4—"Incorporated No. 41 by reference," and you will find no reference there to any hemorrhage. It says nothing about "hemorrhage." What it says, is, No. 4, I am reading, "Three-quarters of an inch laceration of the inner surface of the upper lip of the mid-line——"

The Deputy Director: Just a moment. That's been covered.

Mr. Sellick: I object.

By Mr. Sellick:

Q. Doctor, as I understood your answer to the hypothetical question, in your opinion, the driving of the bus was casually related, this driving of the bus from Military Park to 14th Street and 19th Avenue; is that correct, sir? A. Yes, sir.

(133) Q. O. the factual and legal question as to whether that driving of the bus was an accident arising out of and in the course of employment, do you leave that to the Court?

Mr. Gordon: I object to that.

The Deputy Director: Sustained.

Mr. Gordon: How can he have the temerity to ask the doctor when he leaves something to your Honor——

The Deputy Director: Just a minute, please.

Mr. Gordon: I object.

The Deputy Director: You object?

Mr. Gordon: Yes.

The Deputy Director: I sustain the objection. That's for the Court to decide.

By Mr. Sellick:

Q. Doctor, did you tell us on your direct testimony that you found no changes any place except the heart?

Mr. Gordon: I object to that. He has already testified under cross examination, if your Honor please, that he found in the heart and in the lungs by way of this method, heart failure.

The Deputy Director: Answer that, Doctor.

The Witness: Yes, I will reiterate the findings are associated principally with the heart, both (134) atria and the lower lung fields which indicate congestion.

Q. In item 37, you found evidence elsewhere, too, than in the heart, didn't you of sclerosis causing death? A. Evidences of what? I didn't get your question as to meaning "sclerosis," as to the factors causing death in the individual. These were factors, not the sclerosis. The sclerosis was the original cause, but the immediate cause of death here was the congestive heart failure brought on by coronary occlusion, so that the heart was unable to carry on the load which was demanded of it.

Q. Well, did these findings in the heart and other parts of the body indicate that the arteriosclerotic condition that the man had was making progress in and of itself?

Mr. Gordon: I object. It is immaterial, if your Honor please. Just a minute, let me finish. This doctor says, we do have sclerotic condition, and you have a counter-sclerotic condition, but you have an occlusion; you have a heart which by virtue of the situation is unable to bear the load called upon it to bear when he was driving a bus. Now, why should that other question be (135) gone into at this time when that has no bearing on the case.

The Deputy Director: They are respondent's—I will allow this question. I overrule the objection. Do you know the question?

The Witness: I would like to have it repeated, sir.

(Last question read back by the reporter, as follows:)

"Q. Well, did these findings in the heart and other parts of the body indicate that the arteriosclerotic condition that the man had was making progress in and of itself?"

The Witness: I think I can say that the arteriosclerosis here was making progress from a long time back, even during this episode up to the time of death.

By Mr. Sellick:

Q. And you have already told us that you have no cure as to that yourself, you know of no cure? A. I wish I did.

Q. And you have already told us it is not a beneficial condition. I think you told us that? A. That's right, it is not beneficial.

(136) Mr. Sellick: That's all.

Mr. Gordon: Apparently, if your Honor please, I left out page 7 in the autopsy.

The Deputy Director: Off the record.

(Discussion off the record.)

Re-direct examination by Mr. Gordon:

Q. Doctor, did you consider the elements on page 7 in connection with this case? A. Yes, sir, I did.

Q. In other words, you considered all of the findings on autopsy; is that right? A. Yes, sir, I have, sir.

Q. For the purpose of the record, however, I'm going to ask you to explain all of the items on page No. 7, starting with item 26, so that they may be explained in the record as the other items were because inadvertently I omitted to ask you to explain those items, having turned from page 6 to page 8 without looking on the back of page 8, from No. 7, take item 26.

Mr. Sellick: I will make the same objection as in the beginning. I think these things need no explanation from the doctor, but——

The Deputy Director: For the record, I (137) have in my notes here, item 24 followed by item 34.

Mr. Gordon: I skipped a whole page, your Honor.

The Deputy Director: If there are any things of pertinence to this case, I will allow it. I don't think it was done intentionally. All right.

By Mr. Gordon:

Q. Take No. 26, item 26, captioned "Duodenum, bile ducts and pancreas."

Will you read the findings under item 26 and explain them to us and tell us whether there is any significance to this case in that item? A. "Duodenum, bile duct and pancreas." Duodenum contains a small amount of yellow-

green mucoid material. This is apparently the juice that flows from the gall-bladder. The mucosa is free and clear, indicating no disease. No bile block, because when seen, the yellow-green bile and the pancreatic tail is slightly enlarged. That's part of the pancreas there, indicating an abnormality in the pancreas and tail. Parenchyma is pale. Brownish-gray, firm and well packed. That fairly well describes the pancreas.

Q. Anything under these findings of No. 26 significant with reference to the findings in this case? A. None, sir.

(138) Q. Item 37, "Stomach and esophagus." Will you read the findings? A. Stomach and esophagus. The stomach contains about one pint yellow-white fluid chyme, that is, stomach juice. Sour order which it naturally has and mucosa and wall are free and clear. There are no diseases of the inner lining of the stomach. The esophagus, which is the tube which goes from the mouth down to the stomach is free and clear. There is no disease.

Q. Item 28, "Liver and gall-bladder." Will you read —oh, strike that. Is there anything of significance to this case under item No. 27? A. No, sir.

Q. Item No. 28, "Liver and gall-bladder." Will you read the findings there? Explain them for us and tell us if there is anything significant to this case contained under that item in any of the findings? A. The liver is moderately enlarged; of normal configuration. That means size and shape appears to be normal. Smooth purplish-brown surface with a faint ochre mottling. I think all of us have seen livers when they were sliced at the butcher shops. That's black and brown specks. That's what they mean, ochre mottling, like nutmeg, or something along that line, (139) which gives you the finding—indicating normal. The section was moist with mottling similar to that of surface. The markings were faint. The gall-bladder free and clear. Normal liver and gall-bladder.

Q. Item No. 29, "Male G. U." or organs— prostrate, penis, testes and seminal vesicles. Will you please tell us if there is anything there? Will you explain the findings, first, and tell us if there is anything there which is significant? A. The bladder is almost empty and contains about a half ounce of cloudy amber urine. The fact that it is almost empty probably indicates that the man had emptied his bladder very shortly before the incident and a half ounce of cloudy amber urine that's left there, that's what we call a residual urine in the bladder, by virtue of its position, having a little valled in it and the mucosa, slightly hyperemic, slightly inflamed, it's not uncommon to find these bladders at this stage to have a little inflammation about them; otherwise, free and clear. The prostrate is a male gland that's firm, pale, free and clear. Apparently there is no disease in the prostrate.

Q. Anyothing of significance under those findings? A. None, sir.

(140) Q. Item 30 is not applicable and refers to the female? A. That's right.

Q. Item 31, "Abdominal and pelvic cavities." A. There is a moderate amount of yellow-plaque formation in descending aorta with one area of ulceration below arch. No psoas hemorrhage. Free and clear. I think I made the statement before. This was another indication of the athero and/or arteriselerosis.

Q. So the hemorrhage was a psoas hemorrhage? A. Psoas hemorrhage. Psoas muscle is a muscle which arises in the spinal column and it runs behind both kidneys and it runs down into the pelvis. It gives the kidney a certain backward support and if there is hemorrhage in the kidney, once in a while the hemorrhage will go—seep under the sheath of this muscle and it will give you a bulging picture on X-ray or palpation, more so on X-ray to indicate that there is some abnormality in and around the kidneys. This is normal.

Dr. Michael Ritota, for Petitioner—Re-direct.

Q. Now, Doctor, when we talk about coronary arteriosclerotic disease, we have reference, sir, do we not, to the formation of the passage of time of atheromatous plaques or fatty plaques that are deposited (141) on the walls of the coronary arteries; isn't that what is meant by "coronary arteriosclerotic disease"? A. Right, sir.

Q. And it is when one or more of those plaques break off or when there is a deposit of so many of those plaques with the passage of time that the lumen is narrowed or blocked that we have an occlusion; isn't that right?

Mr. Sellick: Your Honor, I object to these types of questions where all the doctor has to do is nod his head.

Mr. Gordon: All right.

The Deputy Director: I sustain the objection.

Mr. Gordon: Answer, Doctor.

The Deputy Director: I think the doctor has explained it. You have explained that before; haven't you?

Mr. Gordon: Well, I didn't think the doctor explained it, but it seems to me that it should be explained because I have reference to the article that he referred to by Professor Paul Dudley White of the Harvard Medical School on his book of heart failure.

The Deputy Director: Let the doctor give it and you put it in the form of a question.

(142) By Mr. Gordon:

Q. Doctor, when you say "coronary arteriosclerotic disease" can be resilient in most people or is resilient in most people from the time they reach forty and onward, just what do you mean by that, Doctor? A. By that——

Q. Will you explain that? A. By that we mean a symptomatic or coronary artery disease without symptoms, but

it has been known and it is a fact that coronary artery disease starts earlier in some individuals than in others and it proceeds with rapidity, varying from individual to individual, and as I tried to quote this particular study that Mr. White was asked——

Mr. Sellick: Your Honor, that's where I have to jump in again.

The Deputy Director: That's right. Just skip this.

Mr. Gordon: Dr. White—it was elicited on cross examination—he choked him off. Now, I want the Court to have the benefit of the studies made by Dr. White. I won't mention what they are.

The Deputy Director: You want this doctor's opinion?

By Mr. Gordon:

(143) Q. Do you subscribe to that opinion of Dr. White? A. (Witness nods head affirmatively.)

Mr. Sellick: I don't know what it is.

The Deputy Director: Sustained.

Mr. Sellick: If Dr. White wants to tell us, let him tell us.

Mr. Gordon: I will have to bring him down from Boston.

The Deputy Director: I think all the medical information is based upon somebody else's work, and so forth.

Mr. Gordon: That's right.

The Deputy Director: Now, we want this doctor's opinion. Let him explain to us what is meant.

By Mr. Gordon:

Q. Can you tell us, Doctor, from your studies and your practice and your observations, which are still going on, up to this very minute, you have never stopped studying from your own testimony, just what you mean? Without mentioning Dr. White specifically by name as one of your studies, without—well— A. Well, I can give you a summary of coronary artery disease. Coronary artery disease is a condition— (144) a disease in which the coronary arteries are affected either by fatty deposition or by calcific deposition.

Q. What? A. Calcific deposition of these arteries. The most common age of this—the onset of this disease is around forty, but I have learned recently that one hundred soldiers autopsied—— .

Mr. Sellick: I object. Now he is quoting somebody else.

Mr. Gordon: These are his studies. He has—

Your Honor, when I get up and I say to this Court, if the Court please, under the Ciewiercz against Public Service case, the law is that a supposition circumstance is entirely immaterial; that we're interested in the actualities. I am quoting from what I have learned. I haven't stopped studying. I continue to study. I will continue to study as long as I live, as long as I am practicing law. The same with these doctors.

The Deputy Director: Sustained.

Mr. Gordon: When they stop studying, then we are in trouble.

The Deputy Director: Just a minute. If the doctor wants to quote from statistics—now, you (145) know yourself that it may be just the case that this does not fit in with the statistics one way

or the other, or, if it does, it may be contrary to what you would expect it to be. Now, on that score, you should know that it is improper.

Mr. Gordon: Avoid the quotation of statistics and tell us merely your opinion based upon your studies, even though it was Dr. White's book on heart failure or his recent lectures at Massachusetts General Hospital in Boston, just tell us——

Mr. Sellick: Well, from a legal point of view——

The Deputy Director: Just leave that up to me. Proceed, Mr. Gordon. Let him put the question. You object, if you care to.

By Mr. Gordon:

Q. Tell us what your opinion is based upon, your practice, your observations and your studies, without actually referring to statistics. A. I will quote no one and I will give you my own observation and experience.

Q. All right.

The Deputy Director: On coronary artery disease.

The Witness: On coronary artery disease.

(146) As I said initially, the disease, the most common and prevalent age is around forty, the onset of it. At least, from what we know and our idea of the onset. There are a few cases where I have seen young individuals—very young individuals with coronary artery disease even under the age of thirty and twenty. I have also seen where individuals without symptoms who died by accident had markedly advanced coronary artery disease, but they had no symptoms. They had coronary artery diesase and they are without symptoms. I have seen with those—those with slight or little coronary artery

disease who have massive symptoms. In other words, the extent of the nature of the coronary artery disease went down into the small branches of the coronary arteries so that when the heart was asked to do a great deal of work, it could not meet the demands and they started to get symptoms of angina, shortness of breath and inability to walk great distances or climb stairs and then, on the other hand, I have seen individuals in the markedly advanced age group in the seventy to eighty age group —markedly advanced with arteriosclerosis and have symptoms, and I have seen those same individuals with markedly (147) advanced arteriosclerosis and who have no symptoms. I have seen individuals without arteriosclerosis of any degree or serious nature of symptoms in any of those age groups. However, I have seen those cases with occlusion of the arteries unknowing to the patient on occasion, but the myocardium, the heart musculature, showed the deficit of blood supply by the evidence of a scar being found there. Those were the cases in which they had occlusion and the occlusion was so gradual and slow that the heart was able to make up the deficit by collateral circulation. Therefore they had no symptoms, but they had the heart damaged as visualized by the presence of a scar. So we can say that coronary heart diseases are very variable things. There is no way clinically in which we can determine the amount of coronary sclerosis in an individual even by symptoms.

Q. That can be determined by autopsy; is that correct?
A. That can only be determined by autopsy in our present state and day of knowledge.

Q. So that, Doctor, when you talked about coronary arteriosclerosis or coronary artery disease, in other (148)

words, you weren't talking about its occlusive effects but you were talking about the formation of these plaques, whether they be atheromatous or whether they be calcific plaques; isn't that correct? A. Yes, by coronary artery disease, I meant either the calcific—and I think I stated that before, either calcific or atheromatous degeneration or deposition.

Q. The plaques? A. That's right.

Q. By "deposition," you mean deposited plaques? A. Well, it doesn't have to be only plaques. It can be fatty tissue and form a fatty degenerated material.

Q. In other words, to compare the formation of these depositions of atheromatous substances and calcific substances, one might take the ordinary waste pipe in a plumbing system and when you take it down you find that there is a lot of rust that is formed on the inside? A. Or sludge.

Mr. Sellick: I object, your Honor. That is surely leading.

The Witness: Or sludge.

Mr. Gordon: Or sludge. Well, isn't it helpful to us? Doesn't it help us? That's all.

Re-cross examination by Mr. Sellick:

(149) Q. In this case, regardless of any symptoms or lack of symptoms as a result of the autopsy, there are findings in different parts of the body that this man had a severe case of arteriosclerosis, isn't that true? A. Yes, sir.

Mr. Sellick. Thank you.

Re-direct examination by Mr. Gordon:

Q. And, Doctor, the fact that this man had a pre-existing arteriosclerosis which was severe, would that enable his body to fight off the insult of the driving of the bus fol-

lowing the start of the heart attack on the morning of February 2nd?

Mr. Sellick: If your Honor please, I object. We have been all over this.

Mr. Gordon: Oh, no, we have not. You brought something out and I want to show it would have no effect because, in fact, the greater the pre-existing condition of arteriosclerosis, the less tolerant that heart is, once the heart attack starts in driving a bus——

The Deputy Director: In view of what the doctor has said, all right. Answer the question.

(150) Mr. Gordon: Answer it, Doctor.

The Witness: I would like to have the question reworded or repeated.

(Last question read back by the reporter, as follows:)

"Q. And, Doctor, the fact that this man had a pre-existing arteriosclerosis which was severe, would that enable his body to fight off the insult of the driving of the bus following the start of the heart attack on the morning of February 2nd?"

The Witness: I think, with the greater the severity of the arteriosclerosis in the individual the less are his chances to ward off any stress or strain upon his body.

By Mr. Gordon:

Q. From the driving of the bus? A. From the driving of the bus.

Mr. Gordon: That's all.

Dr. Michael Ritota, for Petitioner—Re-cross.

Re-cross examination by Mr. Sellick:

Q. Well, Doctor, you are accenting the driving of the bus. What are you doing with the factual situation of his driving his own car which is a thing not remote from his death but closer to it?

(151) Mr. Gordon: I object to that for two reasons: First, so long as the employment was one of the contributing factors, there could be twenty others. There is liability.

The Deputy Director: Let the doctor answer.

Mr. Sellick: Your Honor has the question to decide here——

The Deputy Director: You know the question, doctor?

The Witness: Yes. I think that that carries—that's merely a continuation of the effort upon the heart which initially started at Military Park. In other words, if we assume that this man started his attack at Military Park at 11:00 or 11:30 that morning and therefore the driving of the bus was an imposition upon the work of his heart and called upon extra cardiac reserve which he did not have or which he could not bring forth suddenly, then, in addition to that, the driving of this car was a factor also in the imposition upon his heart.

By Mr. Sellick:

Q. You preface your answer with the word "if." If the first one is an imposition; is that right?

(152) Mr. Gordon: Just a minute. I'm going to object. The answer speaks for itself.

Mr. Sellick: All right, I will let it stand.

The Deputy Director: All right.

Mr. Sellick: That's all.

Re-direct examination by Mr. Gordon:

Q. In other words, Doctor, if I may just conclude my examination with this question: In your opinion, as I understand it, the driving of this bus, once the heart attack started, as you have described, down at Military Park was a contributing factor in his death; isn't that correct? A. Yes, sir.

Mr. Sellick: If your Honor please, we have been all over that.

The Deputy Director: Sustained. The doctor has answered it before.

Mr. Gordon: I think he answered——

Mr. Sellick: He answered.

Mr. Gordon: All right. That's all.

The Deputy Director: Discussion off the record.

(Discussion off the record.)

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(154) April 27, 1955.

Before:

Hon. Stephen J. Lorenz, Deputy Director.

(Appearances as before):

(155) The Deputy Director: This case was started March 16, 1955. Today is the second day.

Dr. Saul Lieb, called as a witness on behalf of the petitioner, having first been duly sworn, testified as follows:

Direct examination by Mr. Gordon:

Q. Doctor, you are a practicing physician in this State? A. Yes, I am.

Q. And when were you admitted to practice in New Jersey, sir?

Mr. Sellick: I will admit the doctor's qualifications as an internist, I believe.

The Witness: That's right.

Mr. Sellick: If you want to qualify him——

Mr. Gordon: Well, I think that you and I would both like to qualify our witnesses in a case, certainly of this importance. I will just ask him to state his qualifications.

By Mr. Gordon:

Q. When were you admitted to practice in the State of New Jersey? A. 1936.

(156) Q. Pardon? A. 1936.

Q. And from what institutions of learning did you obtain your M. D. degree, Doctor? A. University of Maryland.

Q. When? A. In 1935.

Q. And were you admitted to practice in any other State besides New Jersey? A. New York and California.

Q. When were you admitted to practice medicine in New York, about when? A. That would be 1937.

Q. And in California? A. 1946.

Q. Doctor, did you pursue any specialty of medicine since your admission to practice medicine in New Jersey in 1936, I believe you said it was? A. Yes, internal medicine.

Q. Is that the specialty you have pursued? A. That's right.

Q. And is there any particular emphasis in internal medicine on any part of the human anatomy upon which you have particularly concentrated your attention? A. Yes, with particular reference to cardiovascular disease.

Dr. Saul Lieb, for Petitioner—Direct.

Q. Doctor, are you presently connected with any (157) hospitals in your capacity as an internist or cardiologist? A. Newark Beth-Israel Hospital.

Q. As what? A. As an assistant of medicine.

Q. At Newark Beth-Israel Hospital? A. Yes—no—recently, adjunct in medicine; Clara Maass Memorial Hospital, assistant in medicine; cardiologist at Newark City Dispensary.

Q. At the Newark City Dispensary? A. Dispensary. Previous, cardiologist to the Regional Office of the Veterans Administration in Newark; formerly senior clinical assistant at the Mt. Sinai Hospital in New York City in the Cardiac Clinic.

Q. And, Doctor, have you also pursued your specialty in internal medicine in any branch of the Armed Forces of the United States? A. Yes, I was chief of medical service in a station hospital.

Q. Where? A. In a station hospital in Los Angeles.

Q. Did you have any commissioned rank? A. Captain.

Q. And that was when, in World War II? A. That's right.

(158) Q. Now, Doctor, I'm going to ask you a hypothetical question and based upon the evidence adduced in this case, at the end of which I will seek your opinion as to the causal relationship between the death of the petitioner's decedent in this case and his employment on the day that will be mentioned to you—oh, by the way, have you, in this case examined the autopsy protocol, P-2 in evidence, and a copy thereof which I have furnished you with? A. Yes, I have.

The Deputy Director: Referring to——

Q. Referring to P-2 and marked in evidence, if your Honor please, as of March 16, 1955, which is the autopsy protocol of the petitioner's decedent. And, Doctor, have

you studied and considered the said exhibit? A. Yes, I have.

Q. Now, Doctor, will you assume, a man in the person of the petitioner's decedent, Harry Kream, who was born on August 10, 1900 and who died on February 2, 1952, with a span of life of fifty-one years, five months and twenty-three days. Now, you will assume, Doctor, that antecedent to February 2, 1952, that the petitioner's decedent was a man who enjoyed reasonably good health suffering from an occasional cold which he would receive (159) medical treatment for when necessary.

You will assume further that information—you will assume further that for a period of approximately fifteen years antecedent to February 2, 1952, that this man, Harry Kream, was employed as a bus driver by the Public Service Coordinated Transport, a New Jersey corporation, which is the respondent in this case;

That he apparently performed his work without complaint in a competent manner;

That his employment was pretty regular with very little lost time during that period on account of sickness.

Now, you will assume further, Doctor, that on the last day that he lived on February 2, 1952, that Harry Kream called up his boss, a man named Fred Ulbrich, who is the station master at the garage of the Public Service Terminal at 19th Street—20th Street, rather and 16th Avenue in Newark, and, as such, was Harry Kream's boss;

That Harry Kream called him on the morning of February 2, 1952, some time between 11:00 and 11:30 a. m., and told Mr. Ulbrich that he was ill;

That the place where Harry Kream called his boss on the phone was from Military Park in the City (160) of Newark, which was a terminus of this bus—the downtown terminus of the bus;

That he told—by "he," I mean Harry Kream—that he told Mr. Ulbrich that he had been sweating and had the chills and that Mr. Ulbrich told the petitioner's decedent that he would send a relief bus driver to relieve him at 14th Avenue and 16th Street—no—and 19th Street in Newark; the petitioner's decedent then drove this Public Service bus from Military Park through the City streets of Newark on this particular day, which was a Saturday, performing the functions of a bus driver, presumably, namely, driving his bus and taking on and discharging whatever passengers there might have been from Military Park through the City streets of Newark and through the various streets that he would customarily traverse with his bus on the route, until he got to 14th Avenue and 19th Street, where he was relieved by a bus driver named Edward Wayda, who had been sent to relieve the decedent by Mr. Ulbrich; to whom Ulbrich stated that he was to relieve the decedent because the decedent was sick.

Now, you will assume that Mr. Wayda, Edward J. Wayda, the relief bus driver, testified that it was around 11:37 a. m. on February 2, 1952, when he was (161) sent out by Mr. Ulbrich to relieve Harry Kream and that he was told by Ulbrich to proceed to 19th Street and 14th Avenue to take over the bus when Harry Kream arrived there. He testified that Kream walked out of the bus; that he, Wayda, stood at the step.

The Deputy Director: Off the record.

(Discussion off the record.)

The Deputy Director: Go ahead.

By Mr. Gordon:

Q. That Mr. Wayda stated that he noticed that Harry Kream was sweating; that the sweat was coming from his brow, but it was not ordinary sweat, as he stated, for some-

one in the month of February outdoors, as Kream was, when he saw him sweating. He was coming out of the bus, or had come out of the bus; that when he saw this, he felt that Kream should have someone drive him home and he told Kream to call up the company and have someone drive his car home. He also testified that from his observations, in addition to the fact that Harry Kream had this perspiration coming from his forehead, that he would not say that Kream was well, except for that perspiration; in other words, that he looked sick to him. He testified, that the reason that he told the decedent to call up the company and have someone (162) drive his car home was because he knew that the decedent was ill and he had perspiration coming down from his forehead, but the decedent, according to this witness, stated he didn't want to be bothered; got into his car and drove off.

Now, you will assume further, that a short time thereafter, the petitioner's decedent, driving his car, followed by the driver of another automobile immediately in back of him, who observed the petitioner's decedent fall with his head or saw his head drop; the upper part of his body drop towards the wheel of the car; the car seemed to be out of control; that the car careened across to the opposite side of the street; mounted a curb; cut across through a hedge and was stopped by the wall of a building; that when this man who was riding in back of the decedent's car reached him, he found him on the floor of the front seat of the car, bleeding from his lips or mouth, which was cut, trying to say something. He couldn't seem to articulate and within a few minutes thereafter, the man even stopped these motions of his lips.

Now, Doctor, you will assume further, that an ambulance from the City Hospital of Newark came at about 12:40 p. m. to this place where the mishap had (163) occurred opposite 478 Hawthorne Avenue in Newark and the ambu-

lance surgeon pronounced the man dead and his body was removed to the County Morgue of Essex County, where a post mortem examination was made of the decedent, as disclosed by Exhibit P-2 in evidence, and marked as such on March 16, 1955, which is the autopsy protocol.

Now, Doctor, you will assume all of the findings in that autopsy protocol which you have examined and studied, and, taking into consideration these factors which have been expressed to you in the hypothetical question, can you tell us with reasonable medical probability, first, as to the medical cause of death and, secondly, can you tell us with reasonable medical probability whether there is any causal relationship between the death of this man and operation of the bus under the circumstances described to you in the hypothesis?

Mr. Sellick: I want to object to that part about the medical cause of death. I think unless the doctor is here to contradict the medical cause of death as set up in the autopsy report, I think that that question is improper. That's our own—their own note in evidence.

The Deputy Director: Are you referring to the testimony of the doctor who testified?

(164) Mr. Gordon: No, your Honor. I'm just referring to the autopsy protocol and this man may place his interpretation upon that protocol.

The Deputy Director: That is limited to the protocol that is in evidence, which is proper.

Mr. Sellick: What I'm trying to find out is the purpose of the question. Of course, there was a double-barreled question in the end whether he is going to give his opinion in the cause of death for the purpose of contradiction—cause of death and medical cause of death, which is set up in the medical protocol which is in their evidence——

Mr. Gordon: Counsel knows I can't just accept pro forma or ask this man to accept a diagnosis of a cause of death. He can only take findings that are found in that 10-11 Corporation against Brunner.

The Deputy Director: I think the question is proper. The doctor can't express an opinion on an opinion, that is, excluding—if it is a reference to the protocol, I think that's proper. All right, Doctor.

The Witness: The protocol gives as the cause of death, coronary arteriosclerosis, severe, (165) occlusive, and I would agree that that was the proper diagnosis from an examination of the findings and a post mortem examination. I think it is also, to note from the standpoint of causal relationship in this case, that the autopsy also shows evidence of circulartory failure secondary to this occlusive coronary arteriosclerosis and this circulatory failure is manifested by the extension of the atria of the heart and the congestion of the lungs and of the liver.

I think it is also important that the autopsy does not show any evidence of involvement of the heart muscle and that there is no evidence of infection or of any other condition in the autopsy which could possibly account for this man's death. From the facts given me in the hypothetical question, it is my opinion that there is causal relationship between this man's work on the day of his death on February 2, 1952, and the death that occurred. From the facts in the hypothetical question, it can be stated that he obviously was already ill when he called in at about 11:00 or 11:30 a. m. that day. It is my opinion that the symptoms that he had at that time were due——

(166) Q. Will you tell us where, please, from the hypothetical question, he called in from? A. Well, the symp-

toms that he described of sweating and chills and a feeling of illness were due to the fact that he was suffering from an attack of acute coronary insufficiency that had occurred in the natural course of his occlusive coronary disease. In other words, occlusive coronary disease, of course, had pre-existed the day of his death for some time, but from the facts that I have, was asymptomatic—the driving of the bus, after the onset of such an attack from a medical standpoint, was certainly inadvisable and, in my opinion, aggravated the attack of coronary insufficiency which had already had its onset and contributed to and hastened the death that eventually happened.

The findings of circulatory failure on the post-mortem examination are those that one would find secondary to an attack of coronary insufficiency, such as he had sustained. There is no reason to believe that if this man had started his attack of acute coronary insufficiency and had not driven the bus that death would have been inevitable. I think that it is reasonable and probable that with proper medical attention, rest, sufficient treatment, oxygen, medication, that (167) he very likely would have survived. However, in any case, the driving of the bus through the City streets after he had once started such an attack over the distance that he did and the stopping and the letting go of passengers was the competent producing cause in aggravating this attack of acute coronary insufficiency that had already had its onset and contributed to and hastened his death from this cause.

Q. Now, Doctor, from your examination and the study of the autopsy protocol in this case relating to the post-mortem examination made of this decedent, can you find any other cause or of explanation for the initial symptoms manifested by this decedent at Military Park, of sweating and chills at the time and immediately preceding the time

that he called in for relief? A. There was no evidence of any other cause except that of his occlusive coronary disease.

Mr. Gordon: That's all. Cross examine.

Cross examination by Mr. Sellick:

Q. Sweating and chills, Doctor, are also symptoms of a cold; aren't they? A. They can be the symptoms of a cold.

Q. Now, in giving your opinion, you have relied (168) on the facts given to you in the hypothetical question? A. That's right.

Q. When you say that driving of the bus was inadvissable— A. (Interposing) That's right.

Q. Was the driving of his own car inadvisable? A. It sure was. (Witness nods head affirmatively.)

Q. And that occurred closer to the death than the driving of the bus; isn't that true? A. It occurred closer to the time of his death than the driving of the bus, but naturally, the driving of the bus was a much more major type of effort than the driving of his own automobile, and by the time he drove his own automobile, of course, his condition was much worse in any case because he had just finished driving the bus throught the City Streets.

Q. What streets did he drive it through? A. Well, I know he drove from the downtown area of Military Park up to 14th Avenue and 19th Street. I know, too, that without knowing the exact route of the bus that he had to go through the downtown area.

Q. Do you know the distance between those points? A. I would guess that it's several miles, certainly.

Mr. Gordon: How long?

(169) The Witness: Several miles.

By Mr. Sellick:

Q. That's a guess? A. (Witness nods head affirmatively.)

Mr. Gordon: That's what he said, if your Honor please.

Mr. Sellick: All right.

By Mr. Sellick:

Q. Now, you told us of the distance he drove the bus. Now, will you tell us of the distance between 14th Street and 19th Avenue and 478 Hawthorne Avenue?

Mr. Gordon: I'm going to object to that, if your Honor please. It's improper cross examination. Why should this doctor——

The Deputy Director: I know the doctor stated that the driving of the car also—shall I say, was not contributory, but was much less or inadvisable than the driving of the bus.

Mr. Sellick: The doctor also accented the distance——

The Deputy Director: All right. He may describe it.

By Mr. Sellick:

Q. My question is, Doctor, if you are going to (170) indulge in guesses, would you give us your guess of the distance from 14th Street and 19th Avenue to 478 Hawthorne Avenue?

Mr. Gordon: Just a minute, I am going to object to the question as being argumentative and unwarranted. Your Honor, he says if he is going to indulge in guesses. He only guessed about the distance from Military Park up——

The Deputy Director: Strike that "indulge in guesses." I don't know where 478 Hawthorne Avenue is, unless you know?

The Witness: I know it's at an office on Hawthorne Avenue. I would guess that that distance was also several miles.

Mr. Gordon: However——

The Deputy Director: Several miles?

The Witness: Several miles.

By Mr. Sellick:

Q. Now, there is no doubt in your mind, Doctor, that this man had severe coronary—had coronary arteriosclerosis, severe, before February 2, 1952, is there? A. That's right. (Witness nods head affirmatively.)

Q. And that shows up in certain deposits made in parts of his body; doesn't it? (171) A. Well, specifically, in the coronary arteries.

Q. Well, how about looking at No. 31 of the autopsy protocol; does it also show up in the abdominal pubic cavities? A. You asked me—I believe about the coronary arteriosclerosis or coronary disease. Item 31 refers to the aorta where there is also a note of arteriosclerotic deposits.

Q. As a matter of fact, this fellow had arteriosclerotic deposits throughout his body; didn't he? A. Yes, he had generalized arteriosclerosis.

Q. And what are the medical benefits, Doctor, of an untreated generalized arteriosclerosis? What medical benefits would a patient derive from that condition? A. Benefits?

Q. Yes. A. I don't understand that.

Q. What good would it do him? How would it help him?

The Deputy Director: Just a moment.

Mr. Gordon: I'm going to object, if your Honor please. I don't thing it is proper to ask this doctor what benefits or what good a man would (172) derive from having a generalized arteriosclerosis, which obviously is one of the ravages of time.

The Deputy Director: Just a moment. Counsel may have his own purpose in examining. Answer it, Doctor.

The Witness: I don't understand the question.

By Mr. Sellick:

Q. Tell me all the beneficial effects that you feel a patient would derive from an untreated generalized arteriosclerosis? A. I don't think anyone obtains any benefits from having arteriosclerosis.

Q. Do you think it is a detrimental condition? A. Yes, that is, relatively, depending upon its extent and its location.

Q. What is detrimental about it, Doctor?

Mr. Gordon: I am going to object to the carrying on of this line of questioning, if your Honor please. It's obvious. We contend that the more arteriosclerosis he had, the greater the insult by way of aggravation and in the driving of this bus where the man started to get the attack. I don't know what the purpose of questioning can be except to fortify that position.

(173) The Deputy Director: Don't you think that that is information Mr. Sellick should determine. Can you answer the question? Read the question.

(Last question read back by the reporter, as follows:)

"Q. What is detrimental about it, Doctor?"

The Witness: Well, in general, the detrimental effects of arteriosclerosis are those of the laying down of deposits in the blood-vessels which, if great enough in extent, will interfere with the circulation within that vessel.

Q. And a man with generalized arteriosclerosis, with deposits in different parts of his body and a generalized arteriosclerosis like you told us, this man has that condition, could go to its climax in death without anything happening except the disease itself has reached its terminal; is that true?

Mr. Gordon: Just a minute. I'm going to call for authority for this—objection. We are not interested in supposition. In the case of Ciewiercz against Public Service, which was a decision by Justice Persky writing for the Supreme Court in dealing with a heart condition, calling attention to the testimony of several doctors for (174) the Public Service who said that the man could have died from the heart condition while in bed; while following the ordinary functions of nature; while eating a meal; while sitting in a chair. He indicated that it is of no consequence whatsoever; that that could have happened because we deal with reasonable probabilities and not supposition, so I respectfully object to this question on the ground it is incompetent.

The Deputy Director. Overruled. Can you answer the question? The question was, can arteriosclerosis reach the point where a man would die?

The Witness: Yes.

By Mr. Sellick:

Q. And if you just had this autopsy protocol before you with no hypothetical question, would you have any difficulty in giving us an opinion that this man died as a terminal result of the underlying condition of his body?

Mr. Gordon: I object to that on the ground that that is improper. To ask this doctor that question, obviously he has been given a hypothetical question, we can't ignore the facts of driving the bus. Maybe counsel would like to blot it out of (175) his mind, but it is there.

The Deputy Director: All right. Overruled. Can you answer that question? Read it.

(Last question read back by the reporter, as follows:)

"By Mr. Sellick:

"Q. And if you just had this autopsy protocol before you with no hypothetical question, would you have any difficulty in giving us an opinion that this man died as a terminal result of the underlying condition of his body?"

The Witness: I couldn't say that he died necessarily as a terminal result of the condition found because there is nothing about the post-mortem findings that would show me that there was enough pathology there so that death was inevitable. I would have to know, in order to determine the exact precipitating cause of death, the other factors involved at the time he died. Anatomically, I would say that the only thing found was severe occlusive coronary disease which, anatomically, was the cause of his death, but I could not say just from the autopsy alone as to what the precipitating cause was

in producing his death from (176) the coronary disease.

By Mr. Sellick:

Q. Is it your expert medical opinion that a generalized arteriosclerosis is not in and of itself a medical cause of death when it reaches its terminal point?

Mr. Gordon: I object to that. He has answered the question.

The Deputy Director: I think the doctor answered that. Did you answer that, Doctor?

The Witness: Yes, I did.

Mr. Sellick: I didn't hear his answer. I'd like to hear it.

The Deputy Director: Off the record.

(Discussion off the record.)

The Deputy Director: I will sustain the objection because it has been answered by the doctor. Next question.

By Mr. Sellick:

Q. In this particular case, did you find that there was an occlusion in this particular case? A. From the autopsy, of the information that there was one area of complete occlusion in the upper-left anterior descending branch of the coronary artery and (177) another area of occlusion in the large branch of the circumflex near its origin, so that from the protocol we have evidence of two occlusions.

Mr. Gordon: What are you reading from?

Mr. Sellick: No. 15.

Mr. Gordon: No. 15.

By Mr. Sellick:

Q. Do you deny that medically, a generalized arteriosclerosis could lead to that exact result? A. We are—I spoke here specifically of the coronary arteries. When you speak of "generalized arteriosclerosis," you are speaking of involvment of vessels throughout the body. A coronary arteriosclerosis can lead to this amount of occlusion of those particular vessels.

Q. And it could also lead to death? A. It could lead to death under the proper circumstances.

Q. What are the proper circumstances, medically, without any factual background?

Mr. Gordon: Oh, I'm going to object to that. The doctor has answered that from the protocol. He would have to know additional factors to determine what is the precipitating cause. A man has arterio-
(178) sclerosis, but he died because of some precipitating cause or he gets an attack because of some precipitating cause and the doctor has so stated.

The Deputy Director: Can you answer that question Doctor?

By Mr. Sellick:

Q. Doctor, have you ever heard of people dying while at rest with this very same condition that this man died from? A. Yes.

Q. You have known of those cases? A. Yes.

Q. So you really don't need a factual background at all; do you? A. If I had the factual background——

Q. My question is: You don't need a factual background at all; do you? A. One does neet a factual background. One needs the fact that someone died while at rest in this particular case that you're talking about.

Dr. Saul Lieb, for Petitioner—Cross.

Q. Well, you don't deny in this particular case that this man, that the factual background—withdraw that. Did I understand you, Doctor, that you found evidence in the autopsy of a circulatory failure? A. That's right.

(179) Q. Does circulatory failure frequently follow arteriosclerosis? A. I think it would be better to state that it frequently follows coronary sclerosis as in this case.

Q. This man had coronary sclerosis? A. Oh, yes.

Q. And you know of cases of people who died in bed without any movement whatsoever; is that true?

Mr. Gordon: Now, just a minute, I am going to object again on the grounds that these are supposition circumstances and he is——

The Deputy Director: I think, in effect, the doctor has answered your question.

Mr. Sellick: If your Honor please——

The Deputy Director: To save time, answer that question.

The Witness: Yes, I've known of such cases.

By Mr. Sellick:

Q. Do I understand you to say, Doctor, in your direct examination, that the occlusion followed in the natural course? A. No, I say he had an attack of acute coronary insufficiency in the natural course of the disease.

Q. In the natural course of the disease? (180) A. That's right.

Mr. Gordon: At Military Park.

By Mr. Sellick:

Q. Item No. 13, Doctor, of the autopsy protocol, where it says, "The myocardium was flabby." A. Yes.

Q. Is that an indication to you that the disease had already made some progress?

Mr. Gordon: What disease?

Mr. Sellick: The arteriosclerosis and the natural course that the doctor told us aobut.

Mr. Gordon: Now, just a minute. I am going to object. The doctor said in his testimony that when he had the symptoms of chills and sweating at the time that he called up for relief when he was at Military Park, that he had a coronary insufficiency which followed as such in the natural course of events from his coronary arteriosclerosis. Now, the way that question is framed, it would indicate anything but that, and I respectfully ask that the question be stricken or that counsel be directed to reframe it.

The Deputy Director: I think the record indicates what the doctor said,—all right, Doctor, (181) can you answer that, please?

The Witness: The fact that the myocardium is described as flabby is what one would expect in a myocardium that had gone through what this one had from the fact in that hypothetical question, that is, a recent attack of a coronary insufficiency and circulatory failure.

By Mr. Sellick:

Q. Is there any doubt in your mind, Doctor, that the arteriosclerosis in this man had already made progress in his body?

Mr. Gordon: I object to that. It is repetitious. He has answered he had a pre-existing arteriosclerosis. There is no question about it.

The Deputy Director: All right, Doctor, can you answer it?

The Witness: Yes, I think he had an advanced degree of coronary occlusive arteriosclerosis.

Mr. Sellick: Thank you, Doctor.

Re-direct examination by Mr. Gordon:

Q. Now, Doctor, a cold—is a cold an infection? A. That's right.

Q. Is there any evidence of any kind anywhere (182) in this autopsy protocol showing that this man had an infection on this day? A. There is no evidence of any infection. There is no evidence of any cold.

Q. All right. So that, Doctor, with that in mind, is there an elimination, in your opinion, of any factor that a cold brought on the symptoms which this man had of sweating and chills when he called up to be relieved from Military Park?

Mr. Sellick: Your Honor, I object. That surely calls for guesswork. The doctor wasn't there. All he has are the symptoms given by the man over the telephone to the other man.

The Deputy Director: I think the doctor referred to the protocol. Is that what you are referring to?

The Witness: That's right.

Mr. Gordon: That is all I am asking him to refer to.

The Witness: There is no need for any guesswork in this case as to whether there is a cold or infection. We have the autopsy examination which is complete and which definitely shows that there was no infection and no cold.

(183) By Mr. Gordon:

Q. Now, Doctor, specifically speaking, now, in a man with an advanced coronary sclerosis which this man had

prior to this day and the coronary insufficiency which followed as a natural consequence and the attack that he had just prior to his calling in from Military Park for relief from driving, what effect would the driving of that bus as driven by this man from Military Park up to 14th Avenue and 19th Street have upon a heart with an insult of a coronary sclerosis, advanced, which had brought on an attack of coronary insufficiency before he started to drive that bus up to 14th——

Mr. Sellick: I object. I think we have been all over this with the doctor. It's inadvisable——

The Deputy Director: It's already in the record.

Mr. Gordon: Just a minute. When you told counsel that it was inadvisable, specifically, now, Doctor, what effects did the effects of the driving of the bus on that heart have on such a condition with regard to its being a contributing factor or not being a contributing factor in his death?

Mr. Sellick: I object. I think this is (184) repetitious. The doctor gave us a long explanation.

Mr. Gordon: The word "inadvisable——"

The Deputy Director: Just referring to the driving of the car. That's what the doctor said. The driving of the bus aggravated the insufficiency and contributed to his death. It is already in the record.

Mr. Gordon: All right. Then I will withdraw the question.

That's all, Doctor.

Mr. Sellick: That's all.

The Deputy Director: That's all, Doctor. Thank you very much.

What is your bill, Doctor, for your examination of the records?

Motion to Dismiss Claim Petition.

Argument of Counsel on Motion to Dismiss.

The Witness: $25.

(Witness excused.)

Mr. Gordon: Your Honor, I think I should now hand back to the Court Exhibit P-1, the stipulation, P-2, the protocol, P-3, the testimony of the Essex County Court, and P-4, the death certificate.

The Deputy Director: No. P-3 is the stipulation of the autopsy by Dr. Schaaf. Is that included?

(185) Mr. Gordon: In P-2.

The Deputy Director: Very well. Four altogether.

Mr. Gordon: Thank you.

The petitioner rests.

Mr. Sellick: If your Honor please, I move at this time for dismissal of the claim petition on the following grounds: That the petitioner has failed to prove a compensable accident; two, that he gave us no notice of injury within the statutory ninety days; three, he is estopped proceeding with this case by reason of a judgment rendered on the same set of facts in the County Court; four, there is a waiver of renunciation in this case by reason of proceeding in that court and the statements made in that court; five, this matter is res judicata by reason of a judgment rendered in the Essex County Court on the very same subject matter; six, that the petitioner elected as a remedy in that court and got a judgment against him and his pressing that case to a final decision—was an election of remedy.

Now, as to some of the background in this case: The claim petition was filed in this (186) case on May 16, 1952, and the allegation, No. 17 of the claim petition is that the decedent became ill on his tour

of duty; he was required and directed to drive his bus in that condition until he could be relieved. He was so driving his bus which aggravated his illness and resulted in his death on February 2, 1952, from injury to his heart. The petitioner in this case has offered proof in support of that allegation. They apparently claim the accident was that the man was required and directed to drive a bus while ill. The other part of driving—well, they have to get the accident before your Honor is interested in aggravation and the second part of the allegation, without the premise of accident, the aggravation doesn't mean anything. After that we filed an answer denying that there was any causal relationship and that there was an alleged accident. The case was first listed for trial in this court on October the 15th, 1952. Your Honor can check me on this date. At that time they wanted the case not moved and I objected to it being marked "Not moved," because I took the position if I consented to its being marked "Not moved," I might not be able to move to dismiss under the (187) thirty-day dismissal section of the statute. So the Deputy Director at that time gave it a long adjournment and stated that was his practice. The case was adjourned from time to time, as your Honor will note the many adjournments. There is one particular letter addressed to the Court, dated April 9, 1953, and you will find it in your file, requesting an adjournment from petitioner's attorney.

(Short pause.)

The Deputy Director: Proceed.

Mr. Sellick: And counsel will find that in that letter the following statement is made: "I believe it will be to the advantage of all concerned that the third-party suit be tried first so that perhaps we will

not have to proceed with the compensation matter at all."

I think that that is important because it shows that this particular case was just held over our heads until the third-party suit was disposed of. It was really in the form of a club and now they have the reference in. Your Honor has the disability facts before you. After that the adjournment was granted. A third-party suit was started in the Essex County Court. That was started December (188) 29, 1952, and your Honor has that, too, served on January 5, 1953.

Now, it is most important that you look at the allegations of that complaint because they are nothing more or less than the very same allegations which are in this particular petition when they tried to prove this case. As a matter of fact, the facts in evidence are the same ones put in evidence up there.

Allegation No. 5 alleges that the petitioner became very ill and the respondent directed him in such a condition—said condition, to drive and operate his bus for a considerable distance and then abandoned him to his own resources, and that was supposed to be the negligence, your Honor will note, in this particular case, the negligence was supposed to be directing him to drive while under a certain condition, the very same thing. We filed an answer up there setting forth our defenses and there was a pre-trial memorandum which is also in your file, setting forth the very issues and the pre-trial memorandums are very imporant. That was cited by the Supreme Court in the Jersey City Sewerage Authority vs.—Schlossberg *vs.* Jersey City (189) Sewerage Authority, 15 N. J. 360, certified copy of 1952, Supreme Court decision.

Speaking of the pre-trial order, the Supreme Court states—speaking of the discovery in the pre-trial, the Supreme Court states: "Their role in the attainment of the just and proper disposition of an action is not less but, if anything, more important than that of the trial itself and Bench and Bar share jointly the responsibility to govern the prosecution of the action accordingly."

I call that to your Honor's attention because that sets the pattern of what was being tried up in the County Court, negligence, but the factual situation was that the man was directed while ill to drive and operate his bus for a considerable-distance and also, they had the additional allegation of negligence up there that he was abandoned to his own resources; the two points, but one of them is important in this particular case.

Now, Justice Fairlawn, in his decision, which is also in your file, made a ruling on those two points and he stated: "There being no proof that the death of the decedent was caused by any act of the employer, which had been negligently per- (190) formed, the motion for judgment in favor of the defendant is hereby granted." In other words, the very evidence that is before you by stipulation was before Judge Cafiero up there and he made a legal finding that they had not proved that the man was directed to drive by his employment while sick. He also made a finding on the other allegation about abandoning him to his own resources.

Now, they come down here and they want you to make a legal finding that the company did require the man to drive. For your Honor to do that, you have to be an Appellate Court overruling Judge Cafiero and if they didn't like Judge Cafiero's legal

finding on the matter, what they should do is to take an appeal.

Your Honor, I feel, is quite sure, has no power to act as a Judge on the legal finding on the very subject matter by Judge Cafiero, that is before you. Now, there being a legal finding that is unreversed that the company did not require the man to drive, that leaves the alternative, did the man drive himself voluntarily? Well, if he did, and that is the only alternative, they have not established an accident.

(191) In the case of Lohndorf *vs.* Peper, 134 N. J. Law, 156, 135, 352, a case known to have been in compensation, the Court says, "Because an individual continues his occupation when rest is indicated or work contra-indicated, and because by continuing the employment he becomes sick and disabled, does not of itself form a basis for compensation. To hold otherwise is to constitute an employer an insurer in the health and life of the employee." I therefore state on that basis legally it has been found to be the equivalent of a non-suit. There is no direction by the company to drive. If the man drove voluntarily we don't have an accident because in that very same case—I notice here that they seem to base their case on employment. They related the exposed death back to the employment. Judge Oliphant gave us the answer to that very same thing in that Lohndorf case. The words "accident" and "employment" are not synonymous and I therefore state that in this particular case there is no accident. There is absolutely no proof of an accident, a compensable accident. The case should be dismissed on that particular ground.

Now, on the matter of notice: The claim (192) petition itself, No. 11, the question is, "Did you

notify the employer of this accident?" There was no answer; no claim that she did. Of course, this petition is written up in the form of accident instead of injury, which I know in the statute requires injury, but the first claim that we received that this man was claiming injury by accident was when we received a claim petition in this case on May 27, 1952, and that is more than ninety days after the alleged accident and injury. We knew that the man had died. We knew that he was driving his own private automobile, but there is absolutely no proof in the case that the company knew that the man claimed an injury by accident so that they would have been given the opportunity to investigate as it was intended in the statute which was put there for that purpose.

In the case of Corn *vs.* Hygrade Food Products, this is somewhat along the same lines. In that case the Court said, "The extent of the employer's knowledge was that the decedent reported that he was sick on the evening of October 27th and he didn't return to work on the 28th and later on informed that he was suffering from cerebral hemorrhage."

(193) All we have in this case was that the man was sick. He took his own car away. That's all the evidence shows. He ran into a building which they tell us was two miles away and then he died. Where is there any proof of injury by accident in that case that would give us the chance to investigate and find out things about this case, which was the purpose of 34:15-17.

I therefore state on that ground there is no proof of the ninety-day statute of notice or knowledge of accident.

Argument of Counsel on Motion to Dismiss.

Now, on the question of estoppel: Your Honor has a certified copy of a judgment before you that was rendered on complaint and there is the pre-trial order and the trial in the Upper Court. In the case of Harrison *vs.* New Jersey Suburban Water Company, 122 N. J. Law, 189, Court of Errors and Appeals case, it was held: "An estoppel arises where one is concluded from and forbidden by law to speak against his own act or deed; even if it be to say the truth." In this particular case, I will discuss that a little more when I get into it, but in this here case, they are estopped to take the different position—they are estopped by the record. (194) The Court further held, "An estoppel is effective where a person has done some act where—which the policy of the law will not permit him to gainsay or deny."

In addition to that, in the case of In re: 29 N. J. Super. 520, an App. Div. case in 1954, the Court held: "One of the major objectives of the new constitution was to permit, in fact, to require, where possible, the complete determination of a controversy between the parties by the Court which first properly obtained the jurisdiction over the subject matter." Judge Cafiero up in the Upper Court held he did have jurisdiction and they gave a final result on that. The petitioner is now estopped from proceeding here all over again.

In the case of Sears Roebuck *vs.* Kelsey Holding Company, 30 N. J., 307, that is an Appellate Division case 1954, Judge Jayne wrote the opinion and he held in that case and used exclamation points to emphasize his position that a party litigant can be estopped from impugning the position he has taken in another phase of the subject matter of the suit" —and this, Judge Cafiero was told very distinctly and solemnly that this was not a compensation case.

(195) In the case of Smith *vs.* Redtop Taxi, 111, N. J. L., 439, 168 ATL. 796 it was held that no principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into separate claims and separate actions maintained thereto.

There is another Court of Errors and Appeals' case here, Fidelity Union Trust Company *vs.* Chausmer, 120 N. J. Law, 208. That court case held—"The general rule is that a party who has, with knowledge of the facts, assumed a particular position in judicial proceedings and has succeeded in maintaining that position, is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." The very same evidence up in the Upper Court is before you. We are compelled to come in here to try and defend a case that has already been decided and tried, and I say they are estopped.

Now, in the remarks and argument before Judge Cafiero and which is before you in your file—This is their statement by trial counsel in that case: "There is absolutely no evidence to show that this man's heart attack arose by virtue of any employment, but the evidence is to the contrary." (196) The very same evidence was put before you by stipulation. It was also stated in that case—the point is here by petitioner's counsel, that just because a petition for Workmen's Compensation was filed, that doesn't mean the Department has jurisdiction, if, as a result of that background, which is merely an afterthought on Mr. Wille's part, your Honor would dismiss this action:—"We are confronted with a compensation case in which we could not collect because there is no accident arising out of and in the course

of employment." That statement was made, based on the very evidence that is before you by stipulation.

It is also stated in that case on this very same evidence—all I can say by petitioner's attorney—all I can say to you, as stated in the law, is by no stretch of the imagination—and I make this statement solemnly—could this be considered as arising out of and in the course of employment with the Public Service and if my adversary feels that it is, let him say so. He solemnly told the Court up there, to have that Court retain jurisdiction, that this same evidence before you (197) is not a Compensation case——

The Deputy Director: And what did the adversary say to that?

Mr. Sellick: It is before you.

Mr. Gordon: What did he say? Would you read it? I have forgotten.

Mr. Sellick: Mr. Wille says here: "I contend that the case being opened and failure to dismiss as far as an election is concerned, it is for all concerned a jurisdictional question rather than the election of remedies." Justice Cafiero then answered on the broad sole policy that the plaintiff can no longer invoke the jurisdiction of this Court to that extent. "I am going to deny your motion on that particular point." So the Court went along with petitioner's counsel and he stated in that court it was on the jurisdictional point, as a result of his argument on the very same evidence before you and that argument was that the evidence did not show a Compensation case.

The Deputy Director: He retained jurisdiction.

Mr. Sellick: He did. The Court held he had jurisdiction—the very point there. He (198)

later dismissed the case on the failure to prove negligence, but he held he had jurisdiction.

Now, on the question of position taken by counsel in the cases here, there is a case, Trenton Oil Company, In. *vs.* Dries, 30 N. J. Super. 122. That case discusses some other cases on the subject and in that case there is an admission made in the petitioner's behalf, a formal part of the record in the case—and the Court is discussing a case wherein it is cited—I just have some notes—quote from Greenleaf, which says, "Express admission in judicio, stands as conclusive presumption of law (1 Greenleaf's Ev., 27) and cannot be disputed unless it is first shown they were made by mistake. Ibid, 206."

The Court goes on further: "No such claim is made, and under the circumstances, it may be fairly presumed it would be difficult to maintain it, if made."

I contend that these statements made solemnly which help keep the jurisdiction up in that court cannot be gainsay here in this court.

In the case of Gelsmine *vs.* Vignale, 11 N. J. Super. 481, that is an Appellate Division case (199) and the opinion is by Judge Brennan, who is now in the Appellate Division—in that case: "The discontinuance filed as to Bullock recites the claim of the plaintiff against the defendant, Martha Bullock, having been amicably adjusted by a covenant not to sue." That was an action of counsel on the party's behalf. Judge Brennan in the case states or held: "By plain principles of estoppel plaintiff, will not now be heard to ascertain the contrary,"—and this case, which I will read off in support of that statement—so I take the position that they are now estopped, having retained jurisdiction by the position

they took up in that court and had Judge Cafiero retain it. They cannot come down here and tell you you have jurisdiction after taking a contrary position in another court.

I also have in support of this application the case of Ajamian *vs.* Schlanger, Supreme Court case. In this case, 14 N. J. 483. In that case there was a new suit for damages after a suit for rescission had failed. The Court said: "To tolerate his pressing of the pursuit for rescission, even though futile from the outset, to the limits to which it was carried here after the clear (200) warning of its infirmities when the opportunity to shift his ground was still open to him, and to sanction his holding in reserve his one available remedy for the purpose of attack in another suit, would be utterly destructive of the policy to avoid multiplicity of litigation.

"To hold otherwise would be to revive one of the worst defects of the order and to do violence to both the letter and the spirit of the new constitution."

That's our new Supreme Court. They don't like taking the same set of facts into different courts and trying to get a different decision in a different court, although the first Court stands unreversed in legal findings.

Now, on the question of res judicata, of course these things are more or less intertwined—res judicata—the fact that some of the cases hold that themselves.

In the case of Wilford *vs.* Sigmund Eisner Co., 13 N. J. Super. 27, which is a Compensation case, there was a law action which preceded the hearing of a Compensation claim action somewhat like our own case. Defendants did not admit in either (201) tribunal that appellant's lung condition or ailment

was related to his employment and the law action was merely to ascertain if the proofs were taken as true, he was in the wrong forum. That was their position. He lost out in the law case and the Court went on and held, "if the appellant viewed dismissal of the law action as an erroneous application by the Law Division of the law to his proofs, he had a remedy by appeal to seek to reverse the judgment. He cannot on this record successfully contend that he did not pursue that remedy because he was misled by an admission of the defendant that they agreed that he suffered an accident remediable under the Compensation Law." That's what they did up there. They lost the case up there and they come down and want to try it all over again.

Also, on the question of res judicata, in the case *of The Ord of* New Jersey *vs.* George H. Webb, 112 N. J. Law 395, 107 A. 627 (E. & A.), p. 397, in that case—several cases on res judicata are quoted from and it was held and was stated: "It is a doctrine of universal acceptation that the judgment of a competent court of jurisdiction is, until reversed, final and conclusive upon the parties, not only as to every matter which was offered and (202) received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose,"—and numerous cases. In other words, having submitted the factual situation up to that Court and having gotten a legal ruling equivalent to the old type of non-suit that they had not sustained and proved their point on the very same evidence that you have. You, your Honor, as I stated before, have neither the power, nor, I am sure, the power to act as a Appellate Court in the matter.

The Court goes on and holds: "This doctrine is not a mere rule of procedure, but one of substantial

justice unlimited in its operation and the enforcement of which must be exacted whenever it is necessary for the protection and security of rights, as well as for the preservation of the stability and repost of society."

"To do otherwise would be to displace this salutary principle of our jurisprudence and render it of little or no value."

Now, in the case of Esper *vs.* Manhattan Transit Co., Inc., 112 N. J. Law 186—now, this set of facts that they put up before the County Court was (203) the same set of facts that are before you. Of course, whether you call it a question of law—mixed question of fact or law, I think that we have the answer in the Esper case. In that case it was held:

"Judgment of a court of competent jurisdiction on a question of law or fact, or a question of mixed law and fact, once litigated and determined, is so long as it remains unreversed, conclusive upon the parties and their privies not only as to the particular property involved in the suit in which it is pronounced, but as to all future litigation between the same parties or their privies touching the subject matter, though the property involved in the subsequent litigation is different from that which was involved in the first."

It is another example of the fact——

The Deputy Director: Read the last sentence of that.

Mr. Sellick: "—though the property involved in the subsequent litigation is different from that which was involved in the first."

In this particular case, as far as we are (204) concerned, if you want to consider "property," it's the right of recovery.

In the case of Trenton *vs.* Lenzner, 29 N. J. Super. 514 (App. Div. 1954), "Litigant is assuredly entitled to his day in court, but not entitled to relitigate an issue once determined by a valid judgment."

On appeal, 16 N. J. Law, 465, by the Supreme Court, the Supreme Court held: "No appeal was taken from the resulting judgment for the City and the Lenzners are bound by it."

That was another case and an offshoot where another case was tried. The Supreme Court has held: "They are not at liberty to re-litigate the issues there involved." I still say, the same issue decided up there resulted in a legal decision unreversed.

Now, the Supreme Court also has a case of Kelleher *vs.* Lossi, 7, N. J. 17, 25 (1951)—the question of effect of prior judgment came up in that particular case and the Supreme Court said, "And it does not matter that the jury may have acquitted the employee in error. If the judgment is final, it is considered that * * * the (205) plaintiff has had his day in court on the issue and in a forum of his choosing, and the litigation came to an end."

Even if Judge Cafiero made a legal mistake in the legal findings, in his error, that is immaterial in this court. This Court is bound by the judgment of another court which is legal and unreversed on the facts that are before you.

I was able to find a case just in the reverse of this by Judge Duffy, Pagan *vs.* Kaufman, 92 Atl. Second 134, 22 N. J. Super. And that is a case where the compensation case was tried first and then they tried to go up in the Upper Court and Judge Duffy gave us the decision on that one. It was held in that case: "Dismissal of Workmen's Compensa-

tion proceeding on grounds that claimant had failed to sustain burden of proving disability as a result of alleged accident arising out of and in course of employment was 'res judicata' of issue raised in subsequent common law action by claimant against corporation named as respondent-employer in compensation proceeding, though complaint in common law action alleged that an assault was made deliberately and maliciously by agents, (206) servants, of employees of defendant corporation."

In other words, just by adding a few words you don't change the old thing. It's still res judicata. That is still the reverse of ours. In that case, the Compensation position was thrown out instead of going to County Court, Judge Dubrow said, "No, you can't do it."

Now, on election of remedies, I will try—in the citation, Pagan *vs.* Kaufman, 22 N. J. Super.

The Deputy Director: Off the record.

(Discussion off the record.)

Mr. Sellick: I therefore, now on the question of the election of remedies—it has been held that the adoption of the election of remedies is generally found in the principle of waiver of estoppel. I think these three things are more or less infertwined. They are fine legal distinctions, but I don't think they matter too much. It is my contention that where remedies on election of remedies—where remedies are inconsistent, it is the election of one that bars the other, but whether they are consistent is what operates as a bar. Now, in this particular case, if you want to argue that they are inconsistent, the use of one bars the (207) other. If you want to argue that they are consistent, it is the satisfaction that

operates as a bar. So, on this particular case, no matter how they operate, they got their satisfaction. Their satisfaction was in a cause of action. They got a legal result on this evidence. Judge Cafiero gave it to them. It is unreversed and the case—the Supreme Court case here, I have, which I will just cite, Gangers *vs.* Moffet, 8, N. J., 73 (Sup. 1951)—that is our new Supreme Court. In that case it was held: "Thus, at the threshhold, the entire theory of an election of remedies, and whatever incidents follow therefrom are ruled out because the essence of the doctrine of the election of remedies is the conscious choice, with full knowledge of the facts of one of two or more inconsistent remedies."

I think, in this case—holding your case in abeyance for a long time, until the—if they went up there, would not proceed down here, to make full use of that rule. For the reasons stated, I respectfully move that the claim petition be dismissed for the reasons stated.

Mr. Gordon: Now, if your Honor please, (208) my adversary has alleged or made or assigned five grounds for his motion which he has just stated. The first one is "Compensable accident."

"No compensable accident," he says. That was ground No. 1 in his notice of motion which he argued before Deputy Director Wegner. As per the written notice, in your Honor's file, dated June 7, 1954, when he moved on June 16, 1954, before Judge Wegner for a judgment dismissing this claim petition. The second ground which he states here, or another one of the five grounds which he states today, "res judicata." That, if your Honor please, was ground No. 2 in the motion before Judge Wegner, argued on June 16, 1954. A third ground which he alleges here

today, claims as a basis for his motion to dismiss, is election of remedies. That was ground No. 3.

In the motion made before Judge Wegner by the Public Service counsel, another ground which he alleges today for his motion before your Honor is "Waiver of renunciation." That was part of the ground No. 4 in the motion before Judge Wegner. Another ground which he alleges here today is the ground of "estoppel." That was the other part (209) of ground No. 4 in the motion before Judge Wegner. He alleges today only one thing as a ground for dismissal which he did not allege in his motion before Judge Wegner and which he did not argue at that time, although they argued all the other grounds and were turned down by Judge Wegner. That is the ground that he alleges now that there was no notice of compensable injury by accident. That is his fifth ground today. Now, that one I will answer last, but I do want to answer the others first.

Now, the cases which he argued here today are identical with maybe one or two exceptions with the cases that he argued before Judge Wegner. He reads from the same memorandum that he had before Judge Wegner. Incidentally, no memorandum was given, either Judge Wegner or to me—none to Judge Wegner—a memorandum of law, but that's beside the point, but his Honor made note of the decisions, even as I have made them. I have every one of the decisions, with probably the one exception he might have cited today, and I found not a single one of the cases was at all applicable to any of his grounds. In fact, they supported in a large measure our position in this case.

(210) Now, what does Judge Wegner say? I have the original order here, your Honor, and I ask permission to examine so that I can oppose this motion.

The Deputy Director: I wanted to give counsel the opportunity to make his argument. I am mindful of the existence of such an order, but I thought that, inasmuch as this is a very important case, I should hear also—and yet, I feel, gentlemen, that the preliminary order made by Mr. Wegner in this case is binding upon me because otherwise I would not be hearing this case today.

Now, I will hear you today and I will make my ruling as we go along. Go ahead.

Mr. Gordon: Now, Judge Wegner said in his written order and, after all, if Judge Wegner had granted the motion to dismiss made by a Public Service counsel, not only would your Honor not be here today to hear this case, I wouldn't be here to argue it. I probably would have had to go through the steps of an appeal to the ultimate.

Judge Wegner said in that decision, which is signed by him and dated July 26, 1954, he says this: "As to the first ground," and he is referring (211) to the written notice of motion served by Mr. Sellick, namely, that said claim petition does not allege an accident arising out of and in the course of decedent's employment. I am continuing: "As to the first ground, I am of the opinion the doctrine of res adjudicata does not apply to these proceedings. The proceeding in the law action was for negligence in that the respondent failed to provide medical care after having knowledge of the decedent's physical condition. The present petition alleges an accident arising out of and in the course of employment with

the respondent. The test of res adjudicata is set forth in the case of Smith *vs.* Fischer Baking Company, 105 N. J. Law, 567, Supreme Court, 1929. The Court held on pages 568 and 569—and I will quote:

"But a matter is not res adjudicata unless there be,"—and these are the elements—"identity of the thing sued for, of the cause of action of the persons and the parties, of the quality of the persons for and against whom the petition is made, and the judgment in the former suit be so in point as to control the issue in the pending action. To render a prior judgment res adjudicata for the record, must show that the issue (212) was taken on the same allegations which are the foundation of the second action. The test is whether the proof which would fully support the one case would have the same effect in tending to maintain the other. Hoffmener & Sons *vs.* Troast, 83 N. J. Law, 358; Mershow *vs.* Williams, 63, I. D. 398; continuing with the quote from Judge Wegner: "The next ground is that the petitioner made an election to sue in the law court, and therefore is barred in the present suit. There is no merit to this contention. Claimants have only one remedy in cases of injuries by accident arising out of and in the course of employment. The remedy is exclusive for compensation under the terms of the Workmen's Compensation Statute, Stepnowski *vs.* Specific Pharmaceutical, 18 N. J. Super. 495, App. Div. 1952; see also Estelle *vs.* Red Bank, 14 N. J. 256, in 1954."

Continuing with the quotation of Judge Wegner's rulings: "The last ground is that the petitioner should be barred in these proceedings because counsel in the law proceeding stated in open court that there was no accident. I am not concerned in these proceedings with (213) the statements of counsel

made in the law action. The petitioner is entitled to a full and complete hearing on the merits. Federal Leather Co. *vs.* De Renisis, 113, N. J. Law, 235, Supreme Court, 1934. Compensation proceeding is a creature of the statute. Comment of counsel cannot deprive the petitioner of her right to a hearing on the petition. The motion is denied." Signed "John C. Wegner, Deputy Director," dated July 26, 1954.

Now, as I stated at the outset of this proceeding, this is a case, and I said this before Judge Wegner, this is a case which is not the ordinary run-of-the-mill case in Compensation. My goodness, if we were to just adhere and grapple with the ordinary run-of-the-mill case in Compensation, then, your Honor, I say, that we would not, for instance, become the beneficiaries of a decision from the Hudson County Court which for the first time a month ago handed down the decision that a Dupuytren's contracture, that is an occupational disease—a case which incidentally, the decision was initiated by your Honor in the Hudson County vicinage—I mean, the fact that an unusual (214) departure from a run-of-the-mill back case is presented to us does not mean that we cringe from it.

Now, this is not a run-of-the-mill heart case. This is a heart case in which the injury results by virtue of the fact that a man in the throes of a heart attack had to drive a bus and he had to drive it through the Newark city streets on a Saturday morning in the ordinary traffic that is traversing the streets of Downtown Newark for a distance from Military Park to 14th Avenue and 19th Street, and I say to your Honor that the evidence in this case establishes that fact.

Argument of Counsel on Motion to Dismiss.

My friend argues that it is no accidental injury, but the whole point of his argument is res judicata what happened up in the County Court in Essex County. Now, in that County Court we were proceeding on the theory of negligence and failing to furnish a man with medical care. We were not proceeding upon the theory that he met with an accident arising out of and in the course of employment because that could not be the grapplement of an accident at law, but as Judge Wegner said, exclusive—"A creature of the statute of Workmen's Compensation and such jurisdiction resides exclusively (215) with this Division, which was created by the Workmen's Compensation Statute."

The fact that we failed to establish in the eyes of the County Court which, if your Honor reads the record, will show that the night before we had apparently established it, and then upon reflection and study he changed his mind the next day—the fact that we didn't establish negligence on the part of the Public Service—and failing to say—to furnish this stricken bus driver with medical aid, in allowing him to drive a bus through the City streets, that does not have one iota of importance in connection with this case, which is grounded upon an accident arising out of and in the course of the employment with the respondent and the fact that I made comments up there in the Essex County Court in a case in which I stood with my back to the wall, as it were, —I might just as well come in to your Honor and say I represent Mrs. Kream, but I say that she has no Compensation case. I therefore retire from the case and I pick up my papers and walk out the door and go back to my office in Jersey City.

Now, of course, ethically, I think I would (216) be guilty, if I made a statement like that I would be

guilty of a violation of the canons of legal ethics of the American Bar Association, which is applicable to the conduct of a lawyer in this State by direct adoption of our Supreme Courts, so I wouldn't make that statement, but for the sake of argument, in answer to my opponent, let us assume that I made that statement and Mrs. Kream said, "A plague on that lawyer. I'm going to get Mr. Albert to represent me," and Mr. Albert would come in here and would try that case. Could your Honor say that the lawyer who represented Mrs. Kream in a statement before this Court, when the case was called, said "She has no case in Compensation and I am therefore walking out"—would your Honor say that such a statement by me would be binding upon Mrs. Kream because up until the time that I walked out, I'm her mouthpiece here. Would your Honor even so much as make that a part of your decision, the fact that—would you be influenced in any way by it? Of course not, and that's exactly what Judge Wegner said, "who passes upon whether or not a case is compensable or not. Does the County Court in the first instance, Judge Cafiero, (217) who sat in that case?"—No, and he said so, because when he threw us out, he said in his decision, "The widow is not without remedy," and I'm quoting from Judge Cafiero's oral decision:

"The widow is not without remedy, since it has been stated that an action is pending under the Workmen's Compensation Act and its prosecution was being delayed awaiting the outcome of this proceeding."

That is to be found, if your Honor please, on page 6 of the oral decision of Judge Cafiero, which he rendered in the County Court suit, page 6 of the

decision, and whether he said that or not would make no difference. Who else has jurisdiction to hear a compensation case in the first instant? Why, not even the Supreme Court of this State. The only tribunal which has jurisdiction to hear and determine the merits of a Compensation case is the Deputy Director assigned to hear it in the Division of Workmen's Compensation and nobody else can take that away from him and he is the one who decides whether a case is compensable and not a lawyer who is breaking his neck to try to remain up above for what reason—because he feels, if he can get to the jury, his client will probably get ten times (218) what she would get in Compensation, and I might say to your Honor that it looked very much like it and it was an awful heartbreak to go to bed after you were told to sum up a case and to get it ready for the next morning and then to walk in and be told "You are out." You have to be made of the strength of the Rock of Gibraltar to take that stuff, but those are the fortunes of war and we lawyers have more than once tried to console ourselves with the little French statement "Ce Leguerre."

Now, that answers four of those five arguments. This has been decided by Judge Wegner. On the question of notice of a compensable injury by accident, my adversary says. Neither the Act nor the decision interpreting the Act require a petitioner, either in a dependent's claim petition, or in an original petition for injuries filed by the workman himself during his lifetime, neither the Act nor the decisions interpreting the Workmen's Compensation Act require that we give notice of injury by accident. That has been decided so many times that it is fundamental. All that we have to give is either notice that we are injured or notice—or the com-

pany must have knowledge that we have suffered some (219) injury or an effect and we don't have to, in giving notice, attribute it to any particular accident.

Now—and my adversary doesn't contend that, at least, I don't think. At least, I waited for some word from his mouth on that point and he didn't raise it. Now, he said this: "The first we knew this, they claimed injury by accident, was when they filed a claim petition." However—and this is his language, "We knew that he died. We knew that he was sick, but we did not know that he had an injury by accident." Why, there were men sitting in this courtroom—I don't see Mr. Ulbrich here—why, he even, as his boss, even attended the workman's funeral. Nobody is going to deny that. Now, I say to your Honor, that that answers the fifth question on the grounds for his motion which he did not make.

Now, in this case, there need be nothing else shown to establish an accidental injury other than while the workman was in the throes of a heart attack that he drove his bus; whether the Public Service told him to drive the bus from Military Park while he was sick up to 19th Avenue in Newark is of no consequence.

(220) The Deputy Director: 14th Avenue.

Mr. Gordon: And 14th Avenue and 19th Street. Thank you, your Honor—is of no moment and absolutely of no consequence. The only thing that they can possibly hang their hats on would be a direct order that he was not to drive the bus, but he was to remain in Military Park and then, if he violated that, that would be a horse of another color, but that did not happen in this case. Therefore, you have the accident; you have the injury and the death resulting, and may I say that under our decisions, as your

Honor is fully aware of those, because you have held it time and again in decisions that you wrote, that were reported before the new system when they would not permit us to have cases reported, except by approval of the Committee on Opinions,—so long as the accident is one of the contributing factors to the injury or death, it is compensable. That's all we need here and that's all we have sought to establish here and I respectfully submit that this motion should be denied.

Mr. Sellick: I would just like to state briefly that at the time Judge Wegner decided this (221) particular case on the motion, the evidence was not before him. The testimony given in the Upper Court was not before him. He decided it merely on pleadings. Now, your Honor has the evidence before you, and another thing, in Judge Wegner's ruling, he based it on the fact that the thing tried up there was the respondent failed to give medical attention, alleging that the Public Service failed to give medical attention after having acknowledged the accident—after conceding the condition.

I pointed out that the question of being required to drive by the respondent was an issue. Up in that case, I have shown it by the pleadings in both these cases. On that particular point, I don't think that Judge Wegner's ruling covered it in particular, so there is these two points. You have more than Judge Wegner's decision before you. You have the evidence and, in addition to that, I think a careful reading of Judge Wegner's order will be that on the basis that he thought up there, it wasn't res judicata, because the question of medical attention to the man not being furnished, which was a negligent action, was held was what caused the deciding line. I think the ruling of (222) Judge Cafiero, which

your Honor has before you, will show very distinctly that he made a legal ruling on whether the man was required to drive and it is unreversed.

Then, there was some statement by Judge Cafiero who said, "The man was not without remedy." He did, in winding it up, in just trying to say something nice in the end, but he didn't say that the remedy would lead to recovery.

The Deputy Director: The petitioner's case has been presented and petitioner rested.

Respondent moves to dismiss this proceeding on several grounds which by an order heretofore made by the Honorable John C. Wegner, then sitting as a Deputy Director in this vicinage, had been disposed of in favor of the petitioner.

There is one ground, however, that was mentioned this morning that has been excluded or omitted from said order, and that is the last ground today, "Notice of injury."

I have heard this case, today, being the second day, proceeding on this order entered by the Honorable John C. Wegner, retaining jurisdiction in this case. With reference to the additional ground uncovered (223) by said order, having heard the petitioner's case, I rule in favor of the petitioner on the prima facie case.

I deny the motion of the respondent to dismiss and I will hear the respondent's case.

Mr. Sellick: May I have an exception for the record?

The Deputy Director: Exception allowed.

Off the record.

(Discussion off the record.)

(Trial recessed for lunch.)

Discussion.

(Trial resumed.)

The Deputy Director: Are you ready, gentlemen?

Mr. Sellick: Yes.

As your Honor knows, and I understand your Honor's ruling, you based your ruling a good deal on the fact—on part of the fact that Judge Wegner had heard some of these cases before.

The Deputy Director: Correct. He heard the argument before and disposed of said argument in the order.

Mr. Sellick: On the basis of the pleadings before——

The Deputy Director: That's correct.

(224) Mr. Sellick: That is part of the record in this case, as I understand.

The Deputy Director: It is.

Mr. Sellick: Counsel has referred to the exhibits which were referred to at that time, the complaints and all—unless it is agreed, the complaint, answer—certified copy of the judgment, pre-trial order I put in are part of the record in this case, I will offer them as part of my case right now.

The Deputy Director: All right. Off the record.

(Discussion off the record.)

Just a moment, Mr. Sellick, you are now offering certain documents, I take it, in pursuance of your motion; is that right?

Mr. Sellick: No, sir. I am offering them. I take the position that they are already part of the files of the Court as a result of a prior motion when they went in evidence and were used by the Court to decide that motion.

The Deputy Director: If you are satisfied with that, it is sufficient for me.

Discussion.

Mr. Sellick: Well, there has been a question (225) raised whether they are before the Court, so that there won't be any question, I am going to put them in distinctly.

The Deputy Director: Which ones?

Mr. Gordon: On the motion?

Mr. Sellick: No, not on the motion. In support of my case.

Mr. Gordon: Well, then I am certainly going to object.

The Deputy Director: Put them in. I think they are appropriate because they present the respondent's case.

Off the record.

(Discussion off the record.)

Mr. Gordon: I see counsel wants to enter in evidence the comments I made to the Court——

Mr. Sellick: That's correct.

Mr. Gordon: Well, I'm objecting to it. I think it was marked R-5.

Mr. Sellick: That's right.

Mr. Gordon: July 14, '54.

Mr. Sellick: My position is——

The Deputy Director: I have R-6 here. All right, go ahead.

(226) Mr. Gordon: Well, they have been marked in evidence, you say, according to that——

Mr. Sellick: Certainly they are all in evidence on the motion. Now I want them considered, if there is any question at all in anybody's mind, as additional proof, I have my client's interest—I take the position that the files of the Court are part of the evidence in the case. If everybody agrees that they are part of the evidence in the case, I won't take any more time.

Mr. Gordon: I will agree that they were part of the record on the original motion argued before Judge Wegner, but I cannot consent to them being marked in evidence on the motion made here today. They are already in.

The Deputy Director: If they are already in—if you concede that they are already in——

Mr. Sellick: I concede that in July, '54, when the motion was argued, counsel offered the various exhibits stamped—marked in evidence on the motion—and they shall be considered on my case.

Mr. Gordon: Just a moment.

The Deputy Director: Just a moment. They have been considered on your motion. They are (227) already part of my file. Gentlemen, let us not quibble as to whether this is or isn't in. This is in——

Mr. Gordon: This has been in since July, 1954 as evidence on the motion.

Mr. Sellick: He is trying to limit it, Judge. I want it in evidence on my case in the defense of this case.

The Deputy Director: It is already in as part of the file in the defense of this case. All right.

Mr. Sellick: All right.

HARRY HUBERMAN, called as a witness on behalf of the respondent, having first been duly sworn, testified as follows:

Direct examination by Mr. Sellick:

Q. Mr. Huberman, are you employed by Public Service? A. Yes, sir.

Q. In what capacity? A. I'm a trolley starter, now.

Mr. Gordon: Trolley starter?

The Witness: (Nods head affirmatively.)

The Deputy Director: By "Trolley starter," you mean what?

(228) The Witness: Well, I check the buses coming in and out——

The Deputy Director: Buses?

The Witness: Trolleys. We still have trolleys there.

The Deputy Director: That is why I asked.

By Mr. Sellick:

Q. How long have you been employed by Public Service? A. Oh, about thirty-nine years.

Q. Do you know the decedent, Harry Kream? A. I did.

Q. Do you recall the day that he died? A. I did. I do.

Q. Did you see him prior to his death on that day? A. I did.

Q. Where? A. Up at the bummer's room upstairs——

Mr. Gordon: A little slower and a little louder.

The Witness: Up at the recreation room.

The Deputy Director: Where is that?

The Witness: 16th Avenue car house.

By Mr. Sellick:

Q. About what time was this? A. Around noontime.

Q. Did he tell you what he was doing there? (229) A. Well, when I met him, I says, "What do you know?" He says, "Well, I just got relieved."

Q. Did he tell you what he was going to do? A. Well, he said,—well, there was a line waiting there to turn his money in and the line was too big, so he said, "I think I'll go home and get dressed; take my wife out and come back and turn my money in."

Q. As he appeared to you, how did he appear? A. Well, he looked all right to me.

Harry Huberman, for Respondent—Direct.

Q. Did he tell you why he was relieved? A. No.

Q. Did he give you any indication by his appearance of illness of any kind? A. No.

Mr. Gordon: I object to that as leading.

The Deputy Director: It is leading. Sustained.

By Mr. Sellick:

Q. Will you tell us what next you remember on this particular day that you saw him there?

Mr. Gordon: I object, if your Honor please, on the ground that there is now an attempt being made by counsel who has elicited from this man specifically that he saw him on the day that he died—he is attempting now to try and explain something by (230) way of anticipating cross examination. I submit that it is improper direct or redirect and I ask that the question be stricken.

The Deputy Director: Overruled. Answer the question.

Mr. Sellick: Will you read the question back?

(Last question read back by the reporter, as follows:)

"Q. Will you tell us what next you remember on this particular day that you saw him there?"

The Witness: Well, it was on Saturday—Saturday, and I live near the car house, there. It was between five and six. I went down to get a newspaper and one of the bus drivers told me coming up, "Did you hear about Harrry Kream?" I said, "No, what happened?" He says, "Well, he died." I says, "Gee, that's funny. I talked to him around noontime," I said——

Mr. Sellick: Cross examine.

Harry Huberman, for Respondent—Cross.

Cross examination by Mr. Gordon:

Q. What did you see Mr. Kream doing when you saw him at the car barn, when, as you say, around noontime (231) that Saturday when you say he died? A. He wasn't doing anything. He was standing there. I happened to see him—to talk to him.

Q. What was he there for; do you know? A. Well, he told me he had come to turn his money in. He had just gotten relieved.

Q. He said he had just been relieved and he came to turn his money in. And how long did you stay there with him? A. Oh, maybe three or four minutes.

Q. Did you see him turn his money in? A. No. He said he couldn't because the line was too big. He said he was going home first.

Q. Were you on the line? A. No, I'm off Saturday and Sunday.

Q. You were off that day? A. Yes, I generally stop up there every Saturday, like I do my shopping around that neighborhood.

Q. Well, what were you doing, taking a busman's holiday by going into the car barn that day? A. Well, I do that every Saturday.

Q. That's sort of a busman's holiday; is that it? A. That's right; that's right.

Q. Like the policemen going back to the stationhouse on his day off? (232) A. Well, I used to work there.

Q. Is that right? A. That's right. (Witness nods head affirmatively.)

Q. Let me just ask you something, sir: Did he tell you that he was waiting on line to turn in the money? A. He didn't tell me what he was waiting—he wasn't waiting. He was standing and talking to me and the line was where you were standing. He says, "I can't turn in now because the line is too big. I'll go home first."

Harry Huberman, for Respondent—Cross.

Q. How long was the line, about the distance from you and I? A. Oh, they had about ten or twelve men there.

Q. Ten or twelve men? A. Yes.

Q. And he told you he was there to turn in the money and that was around noon? A. That's right.

Q. Well, was it after twelve o'clock, or was it just at twelve? A. Well, it might have been a minute or two before twelve.

Q. It might have been a minute or two before twelve? A. (Witness nods head affirmatively.)

(233) Q. But it was at twelve noon; is that correct? A. Yes, around noontime. (Witness nods head affirmatively.)

Q. What did he have the money in? A. Well, they carry it in their change carrier. I didn't notice where he had it.

Q. In a change carrier what? A. I didn't notice where he had it, but they carried it in their change carriers.

Q. Well, did he have the change carrier in his hands? A. Well, I don't know.

Q. Well, now, Mr. Witness, you have come here to tell us that you talked to him and you know it was that day and you can't tell us where he had—and that he told you he was there to turn in the money? A. That's right.

Q. You can't tell us whether he had the change carrier in his hand? A. No.

Q. Did he have it on a strap around him? A. He might have had it in his pocket.

Q. Well, did you see it bulging from his pocket? A. No.

Q. Did you look? (234) A. I wasn't looking at his pockets.

Q. Kream, you say, told you that he had been relieved; is that right? A. That's right.

Q. Did you ask Kream why he had been relieved? A. I didn't ask him. He says, "I just have."

Q. Wasn't it strange to you that he would be relieved in the middle of the day? A. Oh, that happens quite often.

Q. Well, all right. Didn't you ask him why he was relieved? A. No. It wasn't any of my business.

Q. Did you see Mr. Wayda at the barn? A. No. (Witness shakes head negatively.)

Q. You did not? A. (Witness shakes head negatively.)

Q. Did you see Wayda there at all that day? A. No.

Q. When was the first time you got to that car barn of the bus garage? A. Oh, it must have been about eleven o'clock or so.

Q. Around eleven o'clock? A. (Witness nods head affirmatively.)

Q. And you were there until a minute or two after (235) twelve; is that right? A. That's right. (Witness nods head affirmatively.)

Q. And you didn't see Wayda there? A. I never noticed him.

Q. Now, I didn't ask you that. I asked you whether you saw Wayda in that barn at eleven o'clock; now, answer. A. I did not.

Q. What? A. I did not.

Q. You did not? A. (Witness shakes head negatively.)

Q. Did you see Mr. Ulbrich there? A. Thats right. (Witness nods head affirmatively.)

Q. Did you talk to Mr. Ulbrich? A. I did. (Witness nods head affirmatively.)

Q. Did he tell you that he had sent Wayda or was going to send Wayda to relieve this man? A. No.

Mr. Sellick: Your Honor, I was going to object. This is not proper cross examination.

The Deputy Director: Proceed.

Harry Huberman, for Respondent—Cross.

By Mr. Gordon:

Q. He did not? A. No.

Q. Don't you know, as a matter of fact, that at (236) eleven o'clock that morning, that Ulbrich received a phone call from Kream at Military Park and that he sent Wayda to relieve him? A. I don't know that.

Q. Because the man was sick; you don't know it? A. Ulbrich has a separate office.

Q. Just a minute. You saw Mr. Ulbrich, didn't you? A. That's right. (Witness nods head affirmatively.)

Q. And wasn't news of that sort bandied about at the garage? A. No. (Witness shakes head negatively.)

Q. It was not? A. (Witness shakes head negatively.)

Q. Did you see Kream leave the garage? A. No, I went down ahead of him.

Q. Well, at about what time did you go down and out of the garage? A. Oh, it must have been about three or four minutes after twelve; something like that.

Q. Well, you were with him altogether about how long? A. Oh, I'd say about five or six minutes, that's all, because I was ready to leave when he come up.

Q. Let me read something to you, Mr. Witness, and please listen to it. Under the certification of the (237) ambulance surgeon, a Dr. C. Tierney, there appears on Exhibit P-2 in evidence, the following: Pennies, $1.82; quarters, $1.50; half dollars, $1.50; dimes, $1.70; nickels, $3.55; a one dollar bill; a change carrier, and the other articles are personal articles like a wrist watch, a ring, a pair of eyeglasses, three keys, a lighter and papers. I call your attention to that and I ask you, sir, whether you still persist in saying or whether you still persist in saying that this man went to the barn, although he had been relieved as being a sick man, that he went to the barn or bus garage to turn in his money?

Harry Huberman, for Respondent—Cross.

Mr. Sellick: Your Honor, I object to the word "persists." He persists in saying this man is here to tell us the truth and the fact that the man had the money is affirmative proof supporting this witness.

The Deputy Director: All right.

Mr. Gordon: That is a lot, Mr. Sellick.

The Deputy Director: Just a minute. All right. You still say that, Mr.——

The Witness: That's right, yes.

By Mr. Gordon:

Q. You still say it? A. (Witness nods head affirmatively.)

(238) Q. And you still say you didn't observe a change carrier on his body and person this particular day? A. I don't recollect.

Q. Well, would you say that he didn't have it? A. I wouldn't say that, either.

Q. Well, if you don't recollect, are you able to say whether he did or didn't have it? A. No.

Q. Now, when was the last time that you saw Mr. Ulbrich? A. Oh, I've seen him last Saturday.

Q. I mean, that day? A. Oh, after that, I didn't see him any more.

Q. On the day that the man died, when was the last time that day that you saw Mr. Ulbrich? A. Well, that must have been around quarter to twelve when I got through talking with him.

Q. Talking with whom? A. Mr. Ulbrich.

Q. How long had you been talking with Mr. Ulbrich? A. Oh, around—maybe fifteen minutes.

Q. Where were you talking to him? A. In his office.

Q. And was that customary for you to talk to him (239) for fifteen minutes? A. Customary—sometimes I'd stay longer than that.

Q. What were you talking to Ulbrich about that day now? A. That, I couldn't tell you, now. That's three years ago. I don't remember.

Q. Well, you have told us that you remember the conversation that you had with this man who is now dead. You remember that distinctly? A. Yes.

Q. Very distinctly? A. That's right. (Witness nods head affirmatively.)

Q. That he told you he had been relieved? A. That's right. (Witness nods head affirmatively.)

Q. And that he was there to turn in his money and that he wouldn't wait because the line was too long? A. That will never leave my memory.

Q. What? A. That will never leave my memory.

Q. That will never leave your memory? A. Because he died the same day.

Q. What was there so vivid about that—wait until I finish the question—what makes it so vivid in your mind, that conversation you say you had with the dead man? (240) A. I didn't get that, sir.

Mr. Gordon: Would you read the question back, please?

(Last question read back by the reporter, as follows:)

"Q. What was there so vivid about that—wait until I finish the question—what makes it so vivid in your mind, that conversation you say you had with the dead man?"

The Witness: Well, because about five or six hours later I found out that he had died and that brought it to my memory right away, the conversation that I had with the man.

Q. And you kept it in your mind for three years? A. That's right.

Q. But the fifteen minutes that you had talking with Ulbrich that day, you don't remember a single thing that you said to him? A. No.

Q. Or that Ulbrich said to you? A. No. We generally talk about conditions, that's all.

Q. What conditions? A. Of the garage—the men.

Q. The men? A. That's right.

Q. Well, in the fifteen minutes that you talked (241) with this man Ulbrich, would you swear that he didn't tell you a single word about Harry Kream having called in that he was ill and that he was relieving Kream with another bus driver?

Mr. Sellick: Your Honor, I object. First, I think this is not proper cross examination and, in addition to that, this man has already told us.

Mr. Gordon: Don't put the words in his mouth.

Mr. Sellick: You are asking him to swear. He was very obviously sworn.

Mr. Gordon: Please, let me cross examine, will you.

The Deputy Director: Can you answer?

The Witness: He threw me off.

The Deputy Director: Now, ask the question. Read the question.

(The last question was read back by the reporter, as follows:)

"Q. Well, in the fifteen minutes that you talked with this man Ulbrich, would you swear that he didn't tell you a single word about Harry Kream having called in that he was ill and that he was relieving Kream with another bus driver?"

The Witness: That's right.

By Mr. Gordon:

(242) Q. When did you first tell anyone in the Public Service that this man Kream was talking with you about a minute or two before twelve o'clock noon on the day that he died at the particular garage—the bus garage of the Public Service? A. Well, I told it to the man that told it to me that he had died.

Q. Well, who told you that he died? A. One of the operators.

Q. When did you first tell it to your boss, Mr. Ulbrich? A. Oh, about a year ago.

Q. About a year ago? A. (Witness nods head affirmatively.)

Q. Were you in court in the Essex County Court at the time the common law suit was being tried? A. No.

Q. You were not? A. (Witness shakes head negatively.)

Q. Were you asked by the Public Service to be present at that time? A. No.

Q. Don't you know, as a matter of fact, that Mr. Ulbrich testified in that case and that he never testified (243) that Kream returned to the garage to turn in his money after he was relieved? A. I didn't know that.

Mr. Sellick: Your Honor——

Mr. Gordon: He has answered.

The Deputy Director: All right.

By Mr. Gordon:

Q. Don't you know—oh, by the way, what condition did you say Kream looked to you to be in when you saw him in the garage? A. Well, he looked all right to me.

Q. He did?

The Deputy Director: Off the record.

(Discussion off the record.)

By Mr. Gordon:

Q. Let me ask you this, Mr. Witness: To you he looked all right; is that right? A. Yes.

Q. Nothing wrong with him as far as you were concerned? A. (Witness shakes head negatively.)

Q. I'm talking about Kream's appearance? A. That's right.

Q. Don't you know, as a matter of fact, that to the relief bus driver, Wayda, who saw him, the man was sweating (244) in February outdoors and that to him he looked sick enough and told him to phone in and get somebody to drive him home?

Mr. Sellick: Your Honor, I object.

Mr. Gordon: At that time.

Mr. Sellick: It is immaterial how he looked to the other man.

The Deputy Director: If he knows. All right, go ahead, if he knows.

The Witness: Well, this is the first time I heard that about Wayda. I never heard the testimony before.

The Deputy Director: All right.

By Mr. Gordon:

Q. Did you ever talk to Wayda about this case at all? A. No.

Q. Did you ever talk to Mr. Ulbrich about the case? A. No.

Q. Who was the boss whom you did talk to about the case? A. What do you mean, when?

Q. At any time after the man died, who was—what boss did you ever talk to? A. I never talked to anybody until last year. I didn't know the case was going on.

(245) Q. How did you happen to talk to somebody last year about this conversation that you testified to here? A.

Mr. Ulbrich told me that Kream's case was just settled in court and I says, "I didn't know anything about the case," and I explained what I seen.

Q. Did he ask you whether you knew anything about the case? A. No.

Q. Didn't you tell me a moment ago that you never talked to Mr. Ulbrich about this case? A. No. About what case?

Q. About this case, the Kream case? We are only talking about Kream; aren't we? A. That's right, about this case today, but the other case, I didn't know anything about it.

Mr. Gordon: If your Honor please, I am going to ask permission to have the reporter go back one or two questions where this man told me he never talked to Ulbrich about this case. May we just have it read?

Mr. Sellick: If your Honor please, the man has been quite definite, that he never talked about the other case because he never heard about it, but this one he has heard about it.

(246) Mr. Gordon: No, he doesn't say that at all. Can we go back?

The Deputy Director: Yes, please.

(The following question and answer read back by the reporter.)

"Q. Did you ever talk to Mr. Ulbrich about the case? A. No."

Mr. Gordon: I have the part: "Did you ever talk to Mr. Ulbrich about the case?" And he said, "No." Now, it was only last year that you talked to Ulbrich about the case, you tell us; is that right?

A. When the other case was over here, that's right, not about this case; I didn't know anything about this case.

Q. The Kream case; isn't it Kream; right? A. From what I hear there was three cases.

Q. Why not make it six, Mr. Witness, and maybe we will get somewhere.

Mr. Sellick: If your Honor please——

The Deputy Director: Strike that out.

Mr. Sellick: Yes.

By Mr. Gordon:

Q. Now, Mr.——

Mr. Sellick: Wait a minute.

Mr. Gordon: Just a minute. There is no (247) question pending.

The Deputy Director: This comment of "six cases," strike that, please.

By Mr. Gordon:

Q. Mr. Witness, let me ask you this: You say it was about a year ago that you spoke to Mr. Ulbrich for the first time about the Kream case; is that correct? A. Yes.

Q. Now, this man died on February 2, 1952, so that it was in 1954 that you first talked to Ulbrich about the conversation you had? A. About a year, yes.

Q. About Mr. Kream, right, on the day that he died? A. (Witness nods head affirmatively.)

Q. How often did you see Mr. Ulbrich at this garage where you say you worked and where you went every Saturday when you weren't working? How often did you see Mr. Ulbrich at the garage from the day that Kream died on February 2, 1952, until about a year ago in the spring of 1954? A. About every Saturday or every other Saturday.

Q. Did you see him during the week, too? A. No.

Q. And every time that you saw him, you would talk (248) to him not only fifteen minutes, but sometimes even longer; is that right, to Ulbrich? A. Well, sometimes, yes.

Q. And yet, never once did you tell Mr. Ulbrich what you knew about the last conversation you had with Kream; is that right? A. I didn't think it was necessary.

Q. Did you know that there was any kind of a case pending? A. No, I did not.

Q. Didn't Mr. Ulbrich tell you that the widow was suing the Public Service in the Law Court? A. No. (Witness shakes head negatively.)

Q. Didn't any of the other men around the place tell you that the widow was suing? A. No.

Q. The Public Service—let me finish the question—did they? A. No.

Q. Did Mr. Wayda ever tell you that he was going down to the courthouse in Newark to testify against the widow? A. No.

Q. Did Ulbrich tell you at any time during these (249) two years or so that went by from the man's death—wait until I finish—that he was going down to testify in the lawsuit that the widow brought against the Public Service for the death of Harry Kream?

Mr. Sellick: Your Honor, I object. This is getting repetitious. This man has told us very distinctly up until a year ago, up until the time of the other suit, he didn't even know there was a claim against the company.

Mr. Gordon: Well, this goes to his credibility.

The Deputy Director: Did he?

The Witness: No.

The Deputy Director: The anwser is, "No."

By Mr. Gordon:

Q. Did Ulbrich tell you he went to Kream's funeral? A. No.

Q. You know that he attended the funeral; do you not? A. I did not. (Witness shakes head negatively.)

Q. Let me ask you this: Did you make a statement to the Public Service of this last conversation that you had on February 2, 1952, with Harry Kream at the garage? A. That's right.

Q. When did you make that statement to the Public Service? (250) A. A couple of months ago, I guess.

Q. What? A. A month or so ago.

Q. What, a month or so ago—and under what circumstances did you make that statement a month or so ago to the Public Service? A. What do you mean, "under what circumstances"?

Q. Well, how did you come to make such a statement? A. Oh, I had told Ulbrich before that—what I said here, and he must have told the company about it, the lawyer, and they got me down there on the statement.

Q. Who sent you down where? A. My boss told me—told me I was wanted down——

Q. What boss, Ulbrich? A. No, my boss.

Q. Who is your boss? A. Mr. Nardone.

Q. Nardone—N-a-r-d-o-n-e? A. That's right.

Q. He is the boss of the dispatchers? A. Of the subways.

Q. City Subways, No. 7 trolley car? A. That's right.

Q. And where is he stationed? A. Public Service Terminal.

Q. And he instructed you to report to the lawyers for the Public Service about a month ago to give them a (251) statement; right? A. About a month or so ago—maybe a little more. I don't remember.

Q. Did you give them a statement in writing? A. That's right; that's right. (Witness nods head affirmatively.)

Q. And you signed it? A. That's right. (Witness nods head affirmatively.)

Q. And from a year ago until a month ago nobody had asked you to give any statement in writing; is that it? A. No.

Q. And you were not examined by anyone and you didn't volunteer to anyone what you knew about Kream having been in the car barn, as you say, of the bus garage on the day that he died? A. I did tell Mr. Ulbrich that after he told me that, that the case was settled.

Q. Now, in the two-year period from the day that you spoke to Kream for the last time that Saturday until a year ago, you told nobody about what you have told us here? A. It wasn't necessary. Nobody asked me.

Q. No investigator from the Public Service questioned any of the men? (252) A. I don't know if they did, but they never questioned me.

Q. I am going to read you from page 55 of the transcript of the testimony of your then boss, Mr. Ulbrich—Fred Ulbrich.

Mr. Sellick: If your Honor please, I object. Let me put my objection in. What does it mean to this man who never heard of this case until he says a year ago what happened in—what somebody testified in another court?

The Deputy Director: Is Mr. Ulbrich your boss?

The Witness: No.

Mr. Gordon: He was at that time, if your Honor please.

The Witness: No, no, he was not.

Harry Huberman, for Respondent—Cross.

By Mr. Gordon:

Q. Wasn't he the boss of the car barns in 1952, in February? A. But he wasn't mine. I'm not from that car barn.

Q. You are not from that car barn? A. No, I used to work there eleven years ago.

Q. And you would only go back to that car barn on Saturdays? A. That's right.

Q. Every single Saturday? (253) A. That's right, go up to the laundry, get my shirts, do my shopping up around there every Saturday.

Q. You didn't report to that barn every day? A. No.

Q. You would just go in there because Public Service ran it? A. That's right.

Q. The car barn? A. That's right.

Mr. Gordon: Well, I still say, if your Honor please, that this man comes in here, testifies in a manner which he attempts to negate the testimony of Ulbrich and Wayda by trying to tell us that the man was all right, and I want to confront him with their testimony to see, if possible, this man has—men will sometimes do under certain circumstances things like this, but will recant what he has told us, and that is the only purpose I seek to interrogate him along these lines because Wayda said the man was so sick that he had—"I told him to get somebody to take him home."

The Deputy Director: I really can't rule on any objection because there is no question.

Mr. Sellick: Well, he apparently—I treat that as a summation by counsel, but apparently what (254) he wants to do is to take parts of the testimony of another witness and confront this witness with it for the purpose of making this witness change

his mind. Now, as to the factual condition as to the man's condition, it is for your Honor to decide, not for this man to say, "Well, because somebody else testified to it, I have to change my mind."

The Deputy Director: I don't know. I don't know. You are asking me to rule on something. I really don't know what I am ruling on.

Mr. Sellick: Well, I claim it is not proper cross examination. Just because Mr. Wayda answered a certain way——

The Deputy Director: I don't know whether it is Wayda or Ulbrich.

Mr. Gordon: It is Ulbrich.

The Deputy Director: All right. I will permit the question and then I can rule on it.

By Mr. Gordon:

Q. On page 55 of the transcript in the Essex County Court Division, which is marked Exhibit P-3 in evidence, as of March 16, 1955, Mr. Ulbrich was asked these questions and gave these answers:

"Q. From the telephone conversation which he had (255) with you from Military Park in which he told you he had chills and fever and asked to be relieved at 19th Street and 14th Avenue, as you say, from the further operating of the bus, did you feel that he was sick enough to be relieved at 19th Street and 14th Avenue?"

A. I couldn't answer that.

"The Court: Isn't that obvious?

"A. (Continuing) I couldn't answer the question.

"Q. Having sent someone, you were satisfied he was sick enough to be relieved; is that right?

"A. Yes."

Q. Now, I ask you, sir, whether in view of the testimony of Mr. Ulbrich given under oath that this man, according to Ulbrich, was sick enough to be relieved, whether you still will tell us that after he was relieved and within minutes he was at the bus garage and looked perfectly healthy and all right to you?

Mr. Sellick: Your Honor, I object. This is not proper cross examination. What Mr. Ulbrich felt as a result of the telephone call to the man, Mr. Ulbrich accepted the man's word over the telephone. Mr. Ulbrich didn't even know whether the man had chills or fever. What is he supposed to do, give a decision?

(256) The Witness: I don't know.

The Deputy Director: What is the answer?

The Witness: I don't know. To me, he looked all right.

By Mr. Gordon:

Q. To you he looked all right. (Counsel referring to papers.) Let me call your attention to this testimony: The witness Wayda, Edward J. Wayda, who is being cross examined by Mr. Herman Wille in the Essex County Court, trial counsel for the Public Service:

"Q. Mr. Wayda,"—I am reading at the start of page 39. I am reading, rather, at the start from page 39:

"Q. Mr. Wayda, we seem to have lost track of what happened to Mr. Kream after he came out of the bus. My recollection is that he got off the bus and you went on the bus; is that right?

"A. Yes, sir.

"Q. What was the last you saw of Mr. Kream?

"A. Walking across the street to get into his car.

"Q. Where was his car parked?

"A. Between 19th Street and 20th on 14th Avenue.

"Q. Did you know his car?

"A. Yes, sir.

"Q. Do you recall what year and what type of
(257) car it was?

"A. It was a Buick.

"Q. Do you remember the year?

"A. It was either a 1950 or a 1951."

Now, I ask you whether, in view of that testimony, you still say that this man, who, according to Wayda, looked so sick that he wanted somebody to get him to take him home from the company, whether you still say—or he called the company to get someone to take him home, whether you still say the man looked perfectly all right to you when he was, as you contend, or as you have testified to here in the garage of the Public Service——

Mr. Sellick: Your Honor, I object. I think it is immaterial and repetitious and this man saw him at a different time than Wayda, after Wayda—I guess we covered this quite fully.

The Deputy Director: What is the question?

The Witness: I'll say, to me he looked all right. I told you about ten times already.

The Deputy Director: "To me he looked all right."

By Mr. Gordon:

Q. Would you dispute that to someone else he wouldn't look all right? A. That, I wouldn't know.

(258) Q. Well, what do you mean by that statement that you told it to us ten times he looked all right. How did he look all right?

Mr. Sellick: I object to that. If he told us ten times, he has been asked ten times.

The Deputy Director: What do you mean, he looked all right?

The Witness: If I was a physician, I'd probably give you an answer, but to me he looked all right.

By Mr. Gordon:

Q. What was there about him that he looked all right? A. There was nothing about him to me that he looked sick, if that's the way you want it.

Q. Well, was he sweating when you saw him? A. No.

Q. Did he have chills? A. I don't know.

Q. Did he seem to you to be chattering? A. He was normal when I talked to him. If he were chattering, I couldn't talk to him.

Q. You would have noticed him? A. That's right.

Q. To you he looked all right? A. That's right. (Witness nods head affirmatively.)

(259) Q. This was at noontime? A. That's right.

Q. No more than a minute or two? A. Well——

Q. (Continuing)—either side of noon; right? A. That's right. I can't get the exact time. It was around that time.

Q. You told us no more than a minute or two? A. That's right.

Q. Either side of twelve noon? A. That's right. I can't tell you the exact minute or two. It was around noontime.

Q. Who else was in this room with you and the deceased? Can you identify any of the people? A. No, I wouldn't remember any of them, no.

Q. You don't remember their names? A. (Witness shakes head negatively.)

Q. Do you remember their faces? A. No.

Nathan Konigsberg, for Respondent—Direct.

Q. You do not? A. No. (Witness shakes head negatively.)

Q. Don't shake your head. A. No, sir.

Q. Are any of these men who are here in court, were they in that room? A. No.

Q. When you talked to this man, they were not? (260) A. I don't think so. (Witness shakes head negatively.)

Mr. Gordon: That's all.

Mr. Sellick: That's all. Thank you.

(Witness excused.)

NATHAN KONIGSBERG, called as a witness on behalf of the respondent, having first been duly sworn, testified as follows:

Direct examination by Mr. Sellick:

Q. Mr. Konigsberg, you are employed by the respondent, the Public Service? A. I am, sir.

Q. And in what capacity? A. Bus driver.

Q. And you have been employed for how many years? A. Five.

Q. And did you know the decedent, Harry Kream? A. Yes, I did.

Q. Do you recall the day that he died? A. Yes, I do.

Q. Did you see him before his death on that day? A. Yes, I did.

Q. Where at? A. Hawthorne Avenue between 20th Street and Fabian Place.

(261) Mr. Gordon: Just a minute, now. You saw him on Hawthorne Avenue between where?

The Witness: 20th Street and Fabian Place.

By Mr. Sellick:

Q. About what time was that? A. A little after noon. I'd say a little after twelve o'clock, around just about the time—I don't know. It might have been five or ten minutes after.

Q. Five to ten minutes after? A. Yes, after the hour.

Q. Now, will you tell us the occasion of what he was doing and what you were doing at the time? A. Well, as far as I know, he was driving, coming home towards his home, blew the horn at me and waved and I responded.

Q. In what direction was he driving? A. He was coming down Hawthorne and I was going up, I believe it's west coming down. I'm not sure.

Q. You say he blew his horn? A. And he waved, that's right.

Q. And what did you do? A. I proceeded right up to my lay-over point and stayed there until my time.

Q. Did you return the recognition in any way? (262) A. I did. I tooted the horn back to him.

Q. And he tooted and called your attention first; is that right? A. That's right, as far as I can remember, I believe that's the way it happened.

Q. How did he look to you as he passed? A. He was normal to me.

Mr. Gordon: I am going to object to that, if your Honor please. This is a momentary passing. How can anybody possibly make an observation to know how a person looked to them? They are passing in moving vehicles and I think your Honor can take judicial notice of the fact that a person doing that can sometimes barely even see who it is in the passing vehicle coming in the opposite direction.

The Deputy Director: Were you driving?

The Witness: I was driving my bus, your Honor.

The Deputy Director: He was coming?

The Witness: I was going——

The Deputy Director: Coming face to face?

The Witness: That's right.

By Mr. Sellick:

Q. Did you recognize him? A. When he blew the horn and waved at me, I noticed (263) him with his uniform on. That, I did.

Q. Well, from that glance that you had of him and the fact that he blew his horn and waved, how did he look to you as you observed him? A. He looked normal to me, as far as I could see.

Q. Do you have any particular reason for remembering this particular incident on this particular day? A. Yes, I do.

Mr. Gordon: I am going to object on the ground it is entirely self-serving and it is a question I might properly ask on cross examination because if counsel fears that his witness has not been definite as to date or time, he can't prop him up by asking him whether he has any reason for recalling that particular day in reference to any other day.

Mr. Sellick: Your Honor, I would like to state that I don't fear anything. I'm just stating why the man remembers anything. There was an answer——

The Witness: Yes, I do.

By Mr. Sellick:

Q. What was the particular reason? A. Well, when I was coming around Fabian out of 20th Street, proceeding back towards downtown Newark, there was a car up against this building and I was stopped (264) by a patrolman

who identified this bus driver. I got out and helped the cop identify him. I told him who it was.

Q. What was Mr. Kream's position when you saw him then? A. As far as I can remember, he was up in a sitting position, like this (indicating). One cop—policeman was over there and he was bleeding from his mouth. That's all I can remember.

Mr. Gordon: He was what?

The Witness: He was bleeding from his mouth.

By Mr. Sellick:

Q. Was there much blood? A. Well, I'd say there was blood on him; but how much, I don't remember.

Q. Did Mrs. Kream subpoena you as a witness in this case? A. I think she did. I don't know.

Q. Did she subpoena you and serve you with a subpoena? A. I don't know who subpoenaed me. I think so.

Q. Did anybody subpoena you? A. Yes. As far as I was told, I was told to come and report to court, that's all, by my boss.

(265) Q. Well, I am trying to find out, did Mrs. Kream or anybody on her behalf serve you with a subpoena which represents— A. (Interposing) Not that I know of.

Mr. Gordon: Not that he knows of. With $.50?

The Witness: No, I wasn't served with a subpoena with 50 cents, no.

Q. Where was the Kream automobile at the time you saw it on your return trip? A. It was on the sidewalk into the building on Hawthorne Avenue.

Q. Was that on the same side of the street in which he was proceeding or on the opposite side? A. The opposite side of the street.

Mr. Sellick: Cross examine.

Cross examination by Mr. Gordon:

Q. Do you have your operator's license here? A. Yes, I do.

Q. Could I see it? A. (License presented to counsel.) That's both my license and my specials.

Q. These two? A. That's right.

Q. I see, from your auto driver's license, that (266) you must wear corrective glasses while driving? A. That is right.

Q. Now, Mr. Konigsberg, will you tell us how long you have had a conditional license of this sort? A. Ever since I've been driving in the State of New Jersey.

Q. And how long would that be, sir? A. Well, I'd say since 1941.

Q. Since 1941. Now, the condition for which you must wear corrective glasses is what? A. Is at all times.

Q. But what is the condition of your eyes? A. Well, it's the strength of my eyes. I was crossed as a child. I had an operation and I have to wear my glasses to straighten them.

Q. You mean, you had a strabismus in one of your eyes? A. That's right, sir.

Q. In which eye? A. In my left eye.

Q. That is your left eye. And do you have any vision in that left eye? A. Yes, I do.

Q. What is that vision? A. Well, with glasses it's 20/20. Without glasses, I believe it's 20/200ths in both eyes.

(267) Q. When were you operated on for that? A. When I was about eight years old.

Q. And you are, with glasses, able to see 20/20 out of that eye? A. That's right. (Witness nods head affirmatively.)

Q. It was a crossed eye? A. That's right. It was operated on.

Q. Now, what about the other eye? A. The same, 20/20 with glasses. About 20/40 without glasses.

Q. Well, what is the condition you have? Is it near-sightedness now? Why do you wear glasses? A. No, just as far as I can see, for everything in general, for reading.

Q. I know, but what did the doctor tell you he was giving you glasses for, for the other eye, the one that wasn't operated on? A. Just to straighten my eyes, as far as I know.

Q. Isn't it for near-sightedness? A. No, sir; no, sir.

Q. Is it for far-sightedness? A. No.

Q. Is it for astigmatism? A. It's possible.

Q. Now, how fast were you driving your bus when you passed Mr. Kream on this particular day in his car? (268) A. I couldn't—I don't really remember. It might have been between twelve and fifteen miles an hour. That, I don't remember.

Q. It could have been up to twenty-five miles an hour? A. It's possible. I don't remember.

Q. Could you see Kream distinctly and observe every part of his face when you were passing him? A. Well, all I can remember, he blew the horn and I waved to him. I seen his face and didn't bother any more—just like I go by in a car.

Q. You couldn't really look at his face? A. No.

Q. And tell us with any degree of detail how he looked to you; could you? A. No, sir, I cannot.

Q. And when you tell us he looked all right to you, actually, that is only something you have reference to by virtue of the fleeting glimpse you had of him as you went past him? A. That's right, sir.

Q. Is that right? A. That's right.

Q. And this tooting of the horn is something that is observed between the bus drivers? A. That's right.

(269) Q. And the Public Service as a matter of kam-

eraderie and good friendship; isn't it? A. Yes.

Q. It follows almost automatically when you pass another bus driver, you toot the horn; is that right? A. Yes, sir.

Q. When you see him in a bus? A. Yes, sir.

Mr. Gordon: That's all Mr. Konigsberg.

(Witness excused.)

Mr. Sellick: That completes my case, your Honor, with the exception of medical, as I told you before, we had Dr. York here this morning and he had to go away. He is not available today.

The Deputy Director: Off the record.

(Discussion off the record.)

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(270) May 2, 1955.

Before:

HON. STEPHEN J. LORENZ,
Deputy Director.

(Appearances as before.)

(271) DR. JACK S. YORK, called as a witness on behalf of the respondent, having first been duly sworn, testified as follows:

Direct examination by Mr. Sellick:

Q. Doctor, are you a licensed physician in the State of New Jersey?

Mr. Gordon: I will admit Dr. York's qualifications as an internist, which is his specialty.

Mr. Sellick: Thank you, Mr. Gordon. I would just like to put a few of his qualifications on the record, if you don't mind.

Mr. Gordon: Well, then, I will avoid the futility of—off the record.

(Discussion off the record.)

The Deputy Director: Proceed.

By Mr. Sellick:

Q. Doctor, how long have you been practicing in New Jersey, Doctor? A. I've been practicing since 1940.

Q. And will you tell us your particular specialty and some of your medical connections? A. I specialize in internal medicine. I'm certified by the American Board of Internal Medicine (272) since 1945. I am associated with the medical services of St. Michael's Hospital; Harrison Martland Memorial Center; the Beth Israel Hospital; Lutheran Memorial and St. James Hospital in Newark, and I'm on the medical diagnostic service of the Memorial Center of the James Ewing Hospital in New York City. I'm consultant in internal medicine to the Workmen's Compensation Court of the State of New York.

Q. Doctor, did you have occasion to examine the death certificate and protocol in evidence in this case? A. Yes, sir.

Q. And from a reading of that, Doctor, would you tell us what medical information you gleaned from the autopsy protocol in particular?

The Deputy Director: Off the record.

(Discussion off the record.)

The Witness: The pertinent medical facts found on the autopsy protocol are as follows: This patient

was suffering and I'm quoting from the autopsy protocal, "Arteriosclerotic and atherosclerotic changes on the anterior leaflet of the mitral valve."

Mr. Gordon: A little slower.

The Witness: "Arteriosclerotic and athero-
(273) sclerotic changes."

Mr. Gordon: Changes on the mitral valve?

The Witness: On the anterior leaflet of the mitral valve. The aortic cusps. The myocardium or heart muscle was flabby with no areas of scarring or softening. The aorta showed moderate patchy white soft plaque formation and the openings of the aorta were slightly compromised. The coronary arteries revealed moderate to severe eccentric and concentric thickening throughout with calcification. There was one area of complete occlusion in the upper-left anterior descending branch. Another area of occlusion in a large branch of the circumflex artery near its origin with no thrombi.

There was moderate enlargement of the liver. There was a moderate amount of yellow plaque formation in the descending aorta with one area of ulceration just below the arch of the aorta.

Examination of the vessels of the brain revealed the vessels to be somewhat small and thin with slight amount of patchy sclerosis. There was a three-quarter inch laceration of the inner surface of the upper lip of the mid-line. The upper central incisors were chipped and a fragment (274) was lying loose under the upper lip.

The primary cause of death is listed here as coronary sclerosis, severe, occlusive.

Mr. Gordon: Are you reading it from the autopsy record?

The Witness: The autopsy record.
Mr. Gordon: Thank you.
The Witness: The pertinent findings I have.

By Mr. Sellick:

Q. Doctor, I want you to assume that on February 2, 1952, Harry Kream, age fifty-one years, a bus driver of some years' experience, at the end of the run on Park Place adjacent to Military Park, Newark, telephoned the station-master at the 16th Avenue garage in Newark at about 11:35 a. m., inquiring whether he could be supplied with a relief driver at a normal relief point, 19th Street and 14th Avenue, about three blocks away from the garage. Kream informed the station-master by telephone that he was ill and said that he was sweating and had the chills. He had started work driving a bus at 9:58 a. m. that day at the same place that he later asked to be relieved. Kream told the station-master who had no personal knowledge of Kream's condition that he wanted to be relieved at 19th Street and 14th Avenue, (275) along the normal route of the bus and he did not ask for any medical assistance or immediate relief. Kream was informed that relief would be supplied at the point selected by him. The relief driver walked from the garage about three minutes away. He waited for the Kream bus. The relief driver saw Kream seated. At that point, if I recollect, his day card—after, which he got out, stepped out of the bus and the relief driver saw that he was sweating on the brow, but that his walk was the usual or ordinary one. The relief driver told Kream to call up the company and have someone drive his car home because he knew that Kream had reported ill and he looked sick with the perspiration on his forehead. Kream refused that suggestion and stated that he did not want to be bothered; that he would go home himself. Kream walked across the street to get into his own auto which was parked

near by. This occurred shortly before noon. Kream was next seen about noon of the same day inside the garage, 20th Street and 16th Avenue, by the witness, Huberman. Kream told Huberman that he had been relieved and had come to the garage to turn his money in, but that the line was too big and he would go home first, get his wife and turn his money in later. Huberman testified that Kream looked okay to him when he saw him (276) and he noticed nothing unusual about Kream. Huberman saw no evidence of either sweating or chills when he saw Kream at the garage. Shortly after noon, the same day, Kream's private automobile, which he was driving, was seen to cross the highway to the opposite side of the street, mount a curb; run through some hedges and come to rest against a brick wall on Hawthorne Avenue in the vicinity of Fabian Place, Newark. Kream was bleeding from the mouth, mumbling, but unable to make coherent sounds, and shortly thereafter became silent and apparently died. The witness who saw this eventually stated that the impact was not strong, but item No. 4 of the autopsy protocol indicated a laceration of the lip with the upper central incisors, chipped with a fragment lying loose under the upper lip.

Doctor, we will assume further that shortly before the episode described in the collision with the brick wall, the decedent Kream was seen driving his own private auto on Hawthorne Avenue by a fellow bus driver. The horn blew; Kream waved and the bus driver recognized that it was Kream driving his auto down Hawthorne Avenue in the opposite direction. The bus driver returned the greeting. Kream looked normal to the bus driver. Shortly thereafter, on the bus driver's return trip down (277) Hawthorne Avenue, he saw an auto up against a building and stopped at the request of a policeman who, incidentally, asked him if he could identify the bus driver of the private automobile. The bus driver—this particular bus driver stopped,

identified Kream, who was slumped in the driver's seat, bleeding from the mouth. An autopsy was performed by Dr. Homer D. Schaaf at 2:45 p. m. of the same day, and a copy of same is in evidence, which I had requested you to look at and read this additional information upon which you can base your opinion.

Doctor, assuming the facts just stated, can you inform us with reasonable medical probability whether or not the driving of the bus after the telephone call from Military Park up to the point of relief which I have mentioned was causally related to the decedent's death?

Mr. Gordon: I have several objections to interpose to the question. In the first place, the reference was made that Kream looked normal to the passing bus driver on Hawthorne Avenue; he told us under cross examination he couldn't tell how he looked. It was a fleeting glimpse of him, but if this is in accordance with the theory of the Public (278) Service case, naturally, I'm in the position where I make an objection, but they can do whatever they want at their peril. It is their hypothesis. I am just objecting to the—giving them a chance to change it.

The Deputy Director: All right. I think that the testimony of the bus driver on his return trip is as stated by Mr. Sellick. I will let that stand.

Mr. Sellick: I think the words were all right, it was a fleeting glimpse.

The Deputy Director: All right. Consider that a fleeting glance—two passing vehicles in opposite directions.

The Witness: (Witness nods head affirmatively.)

The Deputy Director: All right.

Mr. Gordon: Then, the statement as to what Wayda found: Now, Wayda said that he was perspiring, but it wasn't the perspiration alone. He

himself looked sick to him—sick enough to want him to—impel him to suggest to the man to get somebody to drive you home.

The Deputy Director: That is in the record, too. All right, let that stand, then.

(279) Mr. Gordon: You want the question to stand——

The Deputy Director: No, just as you suggested the wording, as you suggested, I think reflects the testimony. Very well. That is an amendment. Next.

Mr. Gordon: In other words, that wording is changed to read that except for the perspiration the man looked sick to him, sick enough so that he caused —so that he felt impelled to suggest that he get somebody from the company to drive him home.

The Deputy Director: Does Mr. Sellick agree with that?

Mr. Sellick: I have no objection to it. As a matter of fact, I put in he refused the suggestion and I——

The Deputy Director: All right. Consider that as an amendment, also, Dr. York.

Mr. Gordon: And the next point, I would ask is that the hypothesis as stated—again, I know I am giving them a tip as to where it is defective, but I don't want to try this case by trickery. The hypothesis fails to ask this doctor to assume the findings and the condition set forth in the protocol of the autopsy.

The Deputy Director: Well, the doctor has it before him now.

(280) Mr. Gordon: All right.

Mr. Sellick: I think my question says—"and a copy"—and I requested him to look at same and read it as additional information.

The Deputy Director: All right. Can you answer it, Doctor? Do you know the question?

The Witness: Yes, sir.

The Deputy Director: All right.

By Mr. Sellick:

Q. Are you considering the autopsy protocol in your answer, Doctor? A. Yes.

Q. Will you give us your answer and reasons for same? A. I feel that there is no causal relationship between the events that occurred in the hypothetical question in the cause of death in this individual. The autopsy protocol reveals moderate to extensive generalized arteriosclerosis involving not only the coronary arteries of the heart, but the aorta and the cerebral blood-vessels which indicates a systemic generalized disease. The autopsy also shows that this patient has had—the nature of disease has caused obliteration to—to place effort on the coronary arteries and there is nothing in the autopsy record to indicate it was a new closure or (281) old. There is sclerosis of the sclerotic plaques which shows an old degenerated arteriosclerotic process of the vascular tree. The heart muscle shows no evidence of a myocardial infarction. The heart muscle is described as being flabby, but there is no evidence of any necrosis in spite of the fact that this man has had two closures of coronary blood-vessels.

I feel that this man died as a result of the natural process—process of this chronic progressive obliterative arteriosclerotic disease. The major pathology was in the coronary blood-vessels which causes anoxia to the myocardium and I think that the mechanism of death was anoxia due to this obliterative arteriosclerotic disease of the coronary blood-vessels.

Mr. Gordon: Anoxia, due to what?

The Witness: Obliterative disease of the coronary blood-vessels.

Dr. Jack S. York, for Respondent—Cross.

By Mr. Sellick:

Q. What connection, if any, do you feel it had to the employment described in the hypothetical question?

Mr. Gordon: I object. He has already answered it, if your Honor please.

The Deputy Director: I didn't get the actual wording of the question. Would you read the question?

(282) (Last question read back by the reporter, as follows:)

"Q. What connection, if any, do you feel it had to the employment described in the hypothetical question?"

By Mr. Sellick:

Q. Driving that bus from Military Park to the place where he was relieved?

Mr. Gordon: I object. He has already gotten that in the hypothesis and he has already answered it.

The Deputy Director: All right. Cross examine.

Mr. Sellick: Cross examine.

Cross examination by Mr. Gordon:

Q. Doctor, could you tell us, please, by looking at the autopsy protocol what time a post-mortem examination was performed on this day, and I am talking about February 2, 1952? A. 2:45 p. m.

Q. Had rigor mortis set in? A. I don't see any notation here on the chart as to rigor mortis.

Q. May I see the chart a minute? A. (Witness hands chart to counsel.)

Q. It was after twelve noon, was it not, from the (283) reference here in the autopsy protocol that this man was pronounced dead some time after twelve noon by the intern or the doctor on the ambulance, Dr. Tierney, M. D.; isn't that so? A. I believe so.

Q. So that it was a comparatively short time thereafter that the post mortem was performed; isn't that a fact? A. Yes, sir.

Q. Now, the fact that you said that there is no evidence of myocardial infarction because there is no necrotic tissue in the heart muscle, the myocardium—may I ask you whether it isn't a fact that the death occurred and the post-mortem was had so soon after death that in a case of this sort it would be not at all unusual if there were no formation of the necrotic tissue in the myocardium? A. That's possible.

Q. Now, as I understood your reference, Doctor, to the death, you said that he died of anoxia. That is deprivation of oxygen; isn't it? A. Yes.

Q. Due to obliterative disease of the coronary blood-vessel. Wouldn't that be the actual terminal point (284) of death in every heart case? A person doesn't get—is deprived of oxygen because the heart doesn't function? A. In most cases that's true, yes. There are other causes.

Q. Yes, that is right, but in most cases? A. That's true.

Q. Anoxia is the deprivation of oxygen which comes about by virtue of the heart failing to function. Now, Doctor, did you find in this autopsy—I hand it back to you—did you find any evidence in the autopsy protocol of any upper respiratory infection? A. No, sir. (Witness looking at paper.)

Q. Now, was there any other cause of death than the coronary arteriosclerosis, severe, occlusive in this case as assigned by the autopsy protocol? A. No, that's all that was mentioned as the primary cause of death.

Q. Now, Doctor, you haven't—strike that. Would you say that in view of this man's arteriosclerosis antecedent to this day, February 2, 1952, although asymptomatic prior to that day, would you say that the driving of a bus from Military Park through the Newark City traffic, through the Newark City streets from Military Park up to 19th Street and 14th Avenue, is (285) that the correct section, your Honor?

The Deputy Director: Yes.

Mr. Gordon: Thank you.

The Deputy Director: 19th Street and 14th Avenue, is that what you said?

Mr. Gordon: 14th Avenue, that is where he was relieved. We can agree on that; can't we, Mr. Sellick?

The Deputy Director: That's right. I know the section.

Mr. Sellick: 19th Street and 14th Avenue.

The Deputy Director: That's right.

Mr. Gordon: Thank you. Would you say a distance of some several miles after the man had reported in over the telephone that he was ill; that he was sweating and that he had chills and this was in February, would you say that the driving of that bus did that man any good in his condition?

Mr. Sellick: If your Honor please, I object to "any good." That's not the question. It is whether it is causally related to it.

Mr. Gordon: This is cross examination.

The Deputy Director: Go ahead, Doctor.

The Witness: From the facts——

Mr. Gordon: As I gave them to you, now.

(286) The Witness: Including the facts found in the autopsy record, I find no evidence that the incident aggravated his condition.

Dr. Jack S. York, for Respondent—Cross.

By Mr. Gordon:

Q. Tell me this, Doctor: What aggravated the pre-existing condition of arteriosclerosis? A. I think it was the natural progress of the disease with the gradual closures of the coronary vessels causing anoxia. Nothing in the autopsy record to indicate any acute thrombus or any subendocardium bleeding in the coronary blood-vessels.

Q. Let me ask you this, Doctor: What were the symptoms the man complained of being sick and he was, he said he was sweating and he had chills; what is that indicative of down there in Military Park? A. I think those symptoms are difficult to evaluate. Sweating——

Q. Well, could it be symptoms with an arteriosclerotic heart as this man had? Could they be symptoms of a coronary insufficiency; sweating is not unusual in a coronary insufficiency. Chills are rather unusual as a symptom, but they can occur; can't they? A. I haven't seen any chills in coronary insufficiency.

Q. Well, in coronary insufficiency, we frequently (287) get shock; do we not? A. Frequently get what?

Q. Shock? I mean, the man becomes shocked in the throes of a coronary insufficiency; isn't that so, frequently? A. Are you talking about clinical shock? I don't understand the question.

Q. Well, I am not talking about surgical shock. A man has an arteriosclerotic heart. I don't say that in all cases, but in many cases, is it not a fact that one who suffers a coronary insufficiency will be in a state of shock—clinical shock, if you want to call it that? A. No, sir.

Q. He will never be in clinical shock? A. Well—shock is a very loose term that is applied.

Q. Well, I'm not talking—making any loose implication. A. Shock does not—oh, clinical shock does not occur with coronary insufficiency.

Q. What? A. Clinical shock does not occur with coronary insufficiency.

(288) Q. Does it follow it? A. It may follow the complications of coronary insufficiency, but in itself, it does not occur.

Q. How soon those complications of coronary insufficiency occur, are dependent upon the particular individual and the effort he undergoes; isn't that right? A. No, it depends upon the pathology and especially what is happening to the myocardium.

Q. I see. Now, in this case, can you explain any reason for the chills that this man suffered, coupled with perspiration that he suffered at Military Park? A. I can't explain the chills, no, sir.

Q. Now, would you say, Doctor, that if a man had an attack of coronary insufficiency that he should with an arteriosclerotic heart—that's always the basic factor in this particular case here? A. (Witness nods head affirmatively.)

Q. Pre-existent—would you say that the driving of a bus through the City streets of Newark, some several miles between these two points I have mentioned to you have no effect upon his heart?

Mr. Sellick: Your Honor, I object. I think that is repetitious to the very question I objected to before, as it was put in that sense, (289) too. It would be good form——

The Deputy Director: All right. Doctor, can you answer this?

The Witness: Well, I think from the facts that were given to me in this case, I don't find any evidence that there was any acute damage as a result of the incident.

The Deputy Director: Acute damage as a result——

Mr. Gordon: I ask that the answer be stricken on the grounds that it is not responsive because I said, assume that down at Military Park the man—arguendo, that down in Military Park this man had an attack of coronary insufficiency with an arteriosclerotic heart antecedent, would you say that the bus driver driving the bus from Military Park from 19th Street and 14th Avenue would have no effect upon that man whom you are asked to assume this coronary insufficiency downtown——

The Deputy Director: All right. Answer that question.

The Witness: From the facts given to me in the hypothetical and what I find in the autopsy record, I find no evidence of any aggravation as (290) the result of that incident.

By Mr. Gordon:

Q. Well, Doctor, I think you and I have a sufficient regard for one another. I'm not seeking to trap you. I'm sure you are not trying to trap me. Forgetting what was given to you in Mr. Sellick's hypothetical question and just assume arguendo, that this man had an attack of coronary insufficiency immediately prior to making the phone call to be relieved and that thereafter he drove several miles to that point where he was relieved in this bus through the Newark City streets with the traffic of those streets—the usual traffic on a Saturday morning, would you say, sir, bearing in mind also, that he had—and antecedent to this day a coronary arteriosclerosis, would you say that the driving of that bus would not effect the man who had started to have a coronary insufficiency downtown in Military Park?

Mr. Sellick: Your Honor, I object. The question is based on an aggravation from saying that the chills

that the man had coronary insufficiency. There is no proof that that is actually a fact. Dr. York has actually told us the chills are not a part of it. I believe that's so. I mean, the fact of the coronary insufficiency assumed in this question, (291) I don't think is proven in this case.

The Deputy Director: Can you answer it?

The Witness: I can't answer it, sir.

By Mr. Gordon:

Q. You can't answer it? A. No, sir.

Q. Would you, as a doctor, recommend that a man drive a bus, who has a coronary insufficiency who is in the throes or commencement of such an attack? A. No, I wouldn't.

Mr. Gordon: That's all.

Mr. Sellick: That's all. Thank you, Doctor.

DR. JEROME G. KAUFMAN, called as a witness on behalf of the respondent, having first been duly sworn, testified as follows:

Direct examination by Mr. Sellick:

Q. Doctor, you are a licensed physician in the State of New Jersey? A. I am.

Mr. Gordon: I will again admit Dr. Kaufman's qualifications as a cardiologist.

Mr. Sellick: I thank you, Mr. Gordon, but just for the record, I would like to follow the same procedure you followed with your doctor.

The Deputy Director: All right.

(292) The Witness: I practiced internal medicine since 1927; cardiovascular diseases as a spe-

cialty; I am assistant professor of medicine to New York Medical College; attending physician to Newark Beth-Israel and Martland Medical Center; consulting physician to the Fitkin Memorial, Monmouth Memorial and River View Hospitals and I'm a Diplomate of the American Board of Internal Medicine.

Q. Doctor, you have had an opportunity to examine the autopsy protocol in evidence? A. I have.

Q. And the death certificate? A. Yes, sir.

Mr. Sellick: Off the record.

(Discussion off the record.)

The Deputy Director: You heard the hypothetical question given by Mr. Sellick to Dr. York?

The Witness: Yes, sir, and I noted the objections.

By Mr. Sellick:

Q. Doctor, considering the facts in the hypothetical question, together with the corrections made at the end and the autopsy protocol and the death certificate, would you inform us with reasonable medical probability whether or not the driving of the bus after (293) the telephone call between Military Park and the point of relief, I think it was 19th Street and 14th Avenue, was causally related to the decedent's death? A. Based on the hypothetical question as amended, the death certificate and review of the autopsy protocol, it is my opinion that there was no causal relationship between the driving of the bus from 14th—to the end point, anyway, of his last stop at 16th Avenue and what is it, 14th Street?

Q. 19th Street.

The Deputy Director: 14th Avenue and 19th Street.

The Witness: 14th Avenue and 19th Street.

By Mr. Sellick:

Q. Will you give us your reason for this opinion, Doctor? A. This man died as the end result of a pre-existing atherosclerosis which involved, in particular, the coronary arteries of the heart. In fact, on two occasions, he had had closures of the coronary arteries. There was nothing in the autopsy to indicate any recent fresh pathology such as a coronary thrombosis or recent myocardial infarction, so I assumed this man died as a result of anoxia because the coronary vessels did not give sufficient (294) oxygen to his heart muscle which probably went into the ventricular fibrillations and sudden death. At the point when this was occurring he had been in a motor vehicle accident and had an occlusion which resulted in breaking off or chipping off of rather his upper central incisors. I don't feel that there is anything connected with his employment that day as a bus driver that had anything to do with his death.

Mr. Sellick: Cross examine.

Cross examination by Mr. Gordon:

Q. Did you find on examination of the autopsy protocol, Dr. Kaufman, any evidence of any infection in this man of the respiratory or otherwise? A. There was no pulmonary infection. Both lungs are described as clear. There is no mention in the autopsy of the nose, but I don't believe that there was any evidence as far as the lung fields and the bronchi were concerned of any pulmonary infection.

Q. Well, Doctor, so that it is safe to assume, is it not, that this man was not suffering from any cold or other respiratory infections? A. As far as the autopsy goes, there is no evidence of it.

(295) Q. Now, Dr. Kaufman, to what would you attribute the symptoms that he had immediately prior to his

telephone call, of perspiration and chills? A. Perspiration is very common in coronary insufficiency, chills are extremely rare. I don't think that I would be able to account for them, either.

The Deputy Director: The chills?
The Witness: That's right.

By Mr. Gordon:

Q. The chills? A. Of course, "chills" is a peculiar term. There is a difference between "chills" and "chilliness". Still, I would not be able to account for it.

Q. You would not be able to account for it? A. No, sir.

Q. We can account for it coming along with coronary insufficiency, can we not? A. I imagine a man can so perspire after a wind which is blown upon him and becoming chilly, oh, yes, but I can't account for it in any other way.

Q. Now, if you were to assume then that the man had—and, Doctor, I am asking this as an assumption from me, I am asking you to assume that this man had an attack of coronary insufficiency, when he made and just (296) before the time he made the telephone call asking to be relieved and that he then drove this bus through the Newark City streets from Military Park to 19th Street and 14th Avenue where he was still perspiring and where he otherwise looked sick enough to the relief bus driver who suggested that somebody take him home in his car from the company. He called the company for that purpose. Would you say that the driving of that bus would have no effect upon the attack of coronary insufficiency? A. Well, because I have this autopsy before me, I have to answer you that I don't believe that it had any effect. If I didn't have the autopsy, then I would not be in a position to answer, but having an autopsy with no fresh pathology, I can give you the answer that it had any effect, I don't believe——

Dr. Jerome G. Kaufman, for Respondent—Cross.

Q. Well, the autopsy showed that he died of, as you say, an anoxia due to obliterative disease of the coronary blood-vessels; is that right? A. Yes, sir, without any fresh pathology.

Q. What? A. Without any mention of any fresh pathology such as a thrombus.

Q. Well, now, Doctor, let me ask you this, Doctor: (297) How soon do we have fresh pathology, occlusion, that is visible either upon autopsy or following, or if the man is living, by electrocardiogram? A. Let us assume that the man dies from a coronary occlusion due to a thrombus, that thrombus is there visibly, immediately, even if it lasted only a couple of minutes, because the thrombus is what caused the occlusion.

Q. Well, you have in this case an occlusion; don't we have an occlusion? A. Two old occlusions. There is nothing recent—no recent pathology in this entire——

Q. The man was asymptomatic—never treated for any heart condition? A. That does occur, sir. Silent coronaries do occur.

Q. And you say that this condition of coronary arteriosclerosis, severe, occlusive, is all due to pre-existing conditions? A. Absolutely.

Q. And you say that driving the bus with this man feeling as he did had nothing whatsoever to do with that, with the death? Was not even in one iota contributory to death? A. I said, if this man showed fresh pathology, (298) in my opinion, it would be different. There is no evidence of fresh pathology.

Q. Where you find a severe occlusive coronary arteriosclerosis, severe, and you say it is old and has existed for some time, what made him go on up to that moment? A. Because the investigation—because he had an insufficient blood supply from the heart muscle to the coronary arteries to that point.

Q. Well, wouldn't the effect of effort in the driving of a bus have anything to do with that? A. No, the effort of anything doesn't change arteriosclerosis. The effort may contribute to the formation of a coronary hemorrhage or coronary thrombosis, but it has nothing to do with the aging of an atherosclerotic vessel.

Q. But won't the effort, Doctor—the effort engendered in driving a bus push this man to the brink of death and, as it did here, with one who had suffered with occlusive coronary arteriosclerosis? A. No, sir, because there is no fresh pathology.

Q. I just want you to answer yes or no. A. No, sir.

Q. Where you have complete occlusion in a vessel, (299) what is that indicative of? A. That part of the vessel has closed off.

Q. Can he live? A. Yes, he can live with many occlusions of vessels, with many of them.

Q. Well, if we call your attention to the fact that in the upper left anterior descending branch there was an area of complete occlusion, you say that he could live with that? A. Well, he did live with two old areas of occlusion and I so said in my testimony twice, now.

Q. How about the fact that he had an area of occlusion in the large branch of the circumflex near its origin? A. I took those both into consideration in my answer.

Q. And can you tell us how long he had these conditions? A. Many, many years; many, many years. You mean, the occlusion or the atherosclerosis? I'm sorry. Which do you mean now?

Q. The occlusion. A. I can't tell you how long, but they must be very old. By that, I mean more than a few months. (300) Beyond that, I cannot tell.

Q. Now, Doctor, would you advocate that in a man seized with a condition that this man had, as you say he had, would you advocate that he drive a bus? A. Which

condition are you referring to, the coronary insufficiency or to the atherosclerosis?

Q. The coronary insufficiency that you say he had at Military Park. A. I would say if a man came to me with coronary insufficiency, I would put him to bed.

Q. All right. And you have also stated that the man had coronary insufficiency at Military Park that morning? A. I believe so.

Q. You believe so? A. (Witness nods head affirmatively.)

Mr. Sellick: That's all. Thank you, Doctor.

The Deputy Director: Excuse me, just one more question. Will you please be seated.

Mr. Gordon: Oh, just one more question, if I might.

The Deputy Director: Just a second, please.

By Mr. Gordon:

Q. The autopsy protocol which you have referred to (301) is P-2 in evidence? A. Yes, sir.

Q. And the death certificate which you have referred to is P-4 in evidence? A. Yes, sir.

Q. Is that correct? A. (Witness nods head affirmatively.)

Q. Doctor, you wouldn't say that this bleeding that the man had from his lip had anything to do with his death; would you? A. I don't believe so.

Q. From the autopsy? A. I don't believe so.

Q. In other words, there is no evidence in this case that there was an inspiration of blood into the lungs from the lacerated lip? A. The lungs were clear, sir.

Q. They were clear? A. (Witness nods head affirmatively.)

The Deputy Director: Excuse me, Doctor. You mentioned a recent pathology, that the protocol showed no recent pathology. How about the final closure of the vessels?

The Witness: The pathologist reported—the pathologist reported two old closures, otherwise (302) he mentioned no other pathology in the coronary vessels beyond the atherosclerosis, so that it is my theory that this man died as a result of an anoxemia—anoxemia with this ventricular fibrillation as the cause of sudden death.

By Mr. Gordon:

Q. Is there any evidence here of any ventricular fibrillation in this case? A. You never find evidence.

Q. All right. You do sometimes when a man is alive? A. Yes.

Q. On EKG's? A. That's right. There are two ways.

Q. I think you have answered that.

Mr. Sellick: Let the doctor answer.

Mr. Gordon: You can take him on re-direct on that point, if you want to. I just want this doctor—do you say that there was no final closure in this case?

A. No evidence of a final closure. That's why I say he died from anoxia. There are two closures, both of which are old, and the autopsy shows no other closure, Mr. Gordon.

Q. Doctor, what evidence of anoxia would you (303) look for upon death? A. You wouldn't find any. You wouldn't find any. That's physiological.

Q. Well, Doctor, you would find with anoxia, where there is a deprivation of oxygen, you would find cyanosis; would you not? A. After death?

Q. Yes. A. Where?

Q. The lips. A. You might and you might not.

Q. And you might not? A. Because we're not talking about anoxia to the whole body. We're talking about anoxia to the miocardia. That's entirely different. You are talking of anoxia, of general cyanosis. I am talking of miocardia anoxia. These are two different things.

Q. Did you find any venous blood? Was there any venous blood here in the heart anywhere in any of the blood-vessels of the heart? A. Blood-vessels, no. You wouldn't find venous blood except in the veins.

Q. Did you find venous blood here in the heart? A. Where, in the heart?

Q. In any part of it? (304) A. Well, the right side of the heart, the atrium is distended with dark fluid, blood and clots. The left side is dark fluid, blood and clots, and that's probably post-death, probably.

Q. That is probably post-death? A. (Witness nods head affirmatively.)

Q. You also have that, do you not, Doctor, in a situation where a person suffers an occlusion and passes out of the picture, of a coronary thrombosis? A. That's right, or any other cause of this death you might have that.

Q. So that is not a positive thing; is it? A. No, sir.

Q. When you say this man died of anoxia, upon what specific evidence do you base that opinion? A. On my experience in treating people with arteriosclerotic heart disease who do not die from a coronary occlusion. From a thrombosis or some other disease.

Q. Doctor, in this case, in this autopsy record, this protocol, P-2 in evidence, do you find anywhere any evidence to indicate per se that the man died of anoxia? A. That is impossible to find in an autopsy.

Mr. Gordon: That's all.

(305) Mr. Sellick: That's all.

The Deputy Director: Anoxia means lack of oxygen?

The Witness: That's all.

The Deputy Director: That is brought to the heart?

The Witness: In the blood.

The Deputy Director: In the blood I am coming back to my first question that I asked. This closure of the two coronary arteries, Doctor, closed off the blood and oxygen; right?

The Witness: That is correct.

The Deputy Director: Well, when did they close, Doctor?

The Witness: Some time in the past.

The Deputy Director: Well, where did he get his blood and oxygen supply?

The Witness: His heart muscle remained compensated. Every patient who has an occlusion doesn't necessarily go to bed with it and there are silent occlusions in a fairly good percentage of cases and this man had two of them, as far as the record is free of this man ever being hospitalized or being in bed for these two coronary occlusions (306) and he therefore must have had some silent coronary occlusion some time in the past.

The Deputy Director: How far back?

The Witness: Well, beyond three to six months. It might be five years. It might be ten years. I have no way of—it is speculative.

The Deputy Director: Where did he get the blood supply?

The Witness: The rest of the heart compensates. People have been known to have seven or eight up to thirteen occlusions and lived through them. This man had two, which evidently were symptom free.

After which he compensated. If not, he would not have been driving a bus that day.

The Deputy Director: How could you tell these were open closures, Doctor?

The Witness: A pathologist is the only one who can tell by looking at the type of changes in the blood-vessels.

Mr. Gordon: Could I ask a question?

The Deputy Director: I am finished.

By Mr. Gordon:

Q. Is there anything in this autopsy record and you pointed to item 15 when you suggested that there were (307) two old occlusions. Is there anything in there to indicate that the pathologist said that they were two old occlusions? A. Yes, surely.

Q. That he said they were two old occlusions? A. He didn't use the word "old."

Q. What did he use? A. One area of complete occlusion in the area of the anterior descending branch.

Q. That can occur at the time of an accident; can't it? A. If there is a thrombus there, it's the only thing that will do it, otherwise it is due to the closing of the vessel itself. If there is no thrombus there he would have mentioned it—

Q. Doctor, by looking just at that record, do you mean to tell me that these were old occlusions? A. Without question.

Q. Didn't you tell me a moment ago or tell his Honor, or could I have that, please? A. Surely. (Paper presented to counsel.)

Q. I want to refer to it. I will return it to you when you need it. Didn't you tell his Honor that only the pathologist can indicate or can tell whether they are old or new occlusions? (308) A. That's right, at the time he does his autopsy.

Q. Well, all right. There is no reference in here by him, is there, to the effect that he found that these were old occlusions? A. Mr. Gordon, if he had found a thrombus there, he would have described the thrombus, and since there is no thrombus there and since there are two occlusions, they are both old occlusions.

Q. Now, look, Doctor, you know and I know that a great many members of the medical profession use "thrombus" and "occlusion" indiscriminately; do they not? A. I am not a member. I'm a cardiologist of experience.

Q. Yes. I know you are a cardiologist, and haven't you time and again testified in these cases and practically admitted that many times doctors—many doctors will use "thrombus," and "occlusion," indiscriminately? A. Many doctors will. (Witness nods head affirmatively.)

Q. Yes. So that if you were to apply that postulate to this item 15, you would not be able to tell us, would you, definitely, what was in that pathologist's mind when he wrote this down? A. Well——

(309) Q. Let me ask this. A. Let me finish.

Q. Don't let us get angry with one another. A. I think it's very unfair to Dr. Schaaf, who is a very excellent pathologist and Assistant Medical Examiner with whom I worked and whom I know and I know this Medical Examiner's office since 1925.

Q. I ask that that be stricken. I ask that that be—that that defense of a pathologist be stricken from the record first on the ground that it is unresponsive to my question and, secondly, on the ground that we are not at all interested in what this doctor may think about somebody who performed an autopsy.

The Deputy Director: Let the record stand. But, Doctor, can you answer the question?

The Witness: Would you repeat the question?

The Deputy Director: Would you please read it, Mr. Reporter?

(Last question read back by the reporter, as follows:)

"Q. Yes. So that if you were to apply that postulate to this item 15, you would not be able to tell us, would you, definitely, what was in that pathologist's mind when he wrote this down?"

The Witness: Well, I would not apply that (310) postulate to this pathologist.

By Mr. Gordon:

Q. What was that? A. I would not apply that postulate to that pathologist.

Q. Well, I am asking you to apply it for your opinion of this case, in this case. A. I don't think this pathologist is an ordinary—I do not think that this pathologist is an ordinary doctor, inexperienced in cardiovascular pathology.

Q. Doctor, you know and I know that many doctors of years' standing have in these compensation cases and I've tried almost as many of them as you have testified to——

Mr. Sellick: I object to those side remarks.

Mr. Gordon: Just a minute. You know and I know that many doctors, some of them internists, will use "thrombus" and "occlusion," indiscriminately; don't you know that?

A. But pathologists do not.

Q. Let me ask you this: Where we have a complete occlusion of a vessel, what happens to the thrombus? A. You may not have a thrombus. If you have a thrombus, the thrombus heals, and you have an infarct, but there was no infarct in this case and therefore I (311) know that this was an occlusive arterioscleriotic closure.

Q. Now we are getting somewhere. Now, let me ask you this— A. And few——

Q. If we have an infarct, Doctor— A. We do not have an infarct in this case.

Q. Will you let me finish? A. You said we had and I have to correct you. We have not had one.

Q. Why don't you let me finish the question. We have an infarct, Doctor, in a case, which would be of longer duration than the time between the death and the post-mortem here; isn't that right? A. If we had a thrombus; but you can't leave that out.

Q. Look, Doctor, you have said that there is no thrombus because there is no infarct. A. No, sir, there is no infarct because there is no thrombus. You have it in reverse, Mr. Gordon.

Q. Doctor, did you ever hear of a complete occlusion actually having the effect of obliterating a thrombus? A. I think now we're getting a little confused. A thrombus is the thing that completely obliterates the vessel and that causes the occlusion.

(312)[a] Q. That causes the occlusion? A. That is correct.

Q. How is the thrombus visible when you have a complete occlusion? A. When the pathologist cuts the vessel, he sees the actual thrombus in the vessel, which is a piece of red fresh pathology, entirely different from what you have here.

Q. Look, Doctor, do you say that this autopsy of this man, although you find no statement by the pathologist, that it was an old occlusion, do you say, nevertheless, that this occlusion or these two occlusions were old? A. Without question.

Q. Without question? A. Without question. (Witness nods head affirmatively.)

Q. There is no doubt in your mind? A. There is no doubt in my mind.

Q. And why do you say that? A. From my experience and from my knowledge of autopsies of the heart as done in that Medical Examiner's office and from the fact that there are two there.

Q. Look, Doctor, how many branches of the coronary artery do we find? A. There are two main coronary arteries in the (313) right and left which have many hundreds of branches.

Q. Well, the left-anterior descending branch is one of the important branches; is it not? A. It's a fairly large branch.

Q. It's a fairly large branch? A. (Witness nods head affirmatively.)

Q. The circumflex? A. Is not quite as large, but it's a large branch.

Q. But it's a large branch? A. Yes, sir.

Q. And you say that this man was in complete occlusion on those two portions of the coronary artery and that was in existence, in your opinion, from what you see in the autopsy some months prior to the date that he had died. You say that that man with those two branches occluded, one of them completely occluded—that he could continue to work and drive a bus every day through city streets for months and live for those months.

Mr. Sellick: If your Honor please, I object. I think we are getting repetitious and I think that particular question has been answered several times and I object——

The Deputy Director: Overruled. Let the doctor answer.

The Witness: The fact is that he did and the (314) fact is that it's not unusual.

Dr. Jerome G. Kaufman, for Respondent—Cross.

By Mr. Gordon:

Q. Doctor, the fact of the matter is that in an atherosclerotic heart where you have a blockage of the two vessels I have mentioned to you, one of them completely occluded, the other partly occluded, it is most unusual, is it not, for a man to live for those months that you say that he lived here because of the compensated features in the heart—are greatly lessened as a result of those occlusive conditions? A. The only way I can answer that question, if I understand it, is that the mortality from the first coronary occlusion is somewheres between 8 and 15 per cent, so that about 85 per cent of the patients do get better and have compensated hearts and live.

Q. With an atherosclerotic heart? A. Yes, atherosclerotic.

Q. Where do we get the compensated action where you have a complete blockage of one vessel—one of the large branches of the coronary arteries and a partial blockage of another one, so that he can live for months and drive a bus for months? A. And for years.

Q. You are not telling me that this man had this (315) condition of occlusion for years? A. He could have. (Witness nods head affirmatively.)

Q. Well, now, wouldn't you say that that was the worst kind of conjecture on your part that he drove—that he was a bus driver for years with these two vessels blocked as they are set forth in item 15 of the autopsy record? A. It is not an unusual experience at autopsy to find such occlusion in people who have been heavy laborers.

Q. I am asking you whether in this autopsy record whether you find any indication that this man had this for years?

Mr. Sellick: If your Honor please, I think—and I am quite sure we are getting repetitious now.

Dr. Jerome G. Kaufman, for Respondent—Cross.

The Deputy Director: I think the doctor has answered it.

Mr. Gordon: Does your Honor sustain that objection?

The Deputy Director: Yes, I think the doctor has answered it.

May I ask something: Doctor, with a thrombus and an infarct, you have a certain effect upon the myocardium; is that correct?

(316) The Witness: Death of tissue. (Witness nods head affirmatively.)

The Deputy Director: Right. What is the distinction on the myocardium where you have complete occlusion of two coronary vessels as in this case?

The Witness: If you have an infarction—infarct heals and leaves a scar. If you have an occlusion, it may close off a very close area, which is too small for a pathologist to determine whether there is or isn't a scar. There is no mention of a myocardium in this entire autopsy.

The Deputy Director: Wouldn't a larger coronary vessel have a larger effect upon a myocardium?

The Witness: Not necessarily, because the occlusion of a vessel without a thrombus, that is, the occlusion by the atherosclerotic process itself, is very slow and gives a chance for the development of compensation.

By Mr. Gordon:

Q. Doctor, you wouldn't find any scar tissue or any necrosis denoting a myocardial infarction because of the fact that the man died as quickly as he did and had the autopsy performed within two hours thereafter and where there was no rigor mortis that had set in, would (317)

still not show death of heart tissue? A. We're talking about two different things. I'm talking about the old occlusion.

Q. I'm talking about the new one. A. The new one would not show an infarct, no.

Q. A thrombus would not show a myocardial infarction with death—of necrosis in this case if it occurred that day? A. That is correct; that is correct.

Q. And that is borne out, is it not, by the fact that where people have a myocardial infarction, that it sometimes takes twenty-four hours and thirty-six hours even before we can detect the infarct on findings of the electrocardiogram? A. It is frequently after a closure due to the infarct that the infarct does not appear from twenty-four to thirty-fours hours.

Q. For how long, Doctor? A. Twenty-four and thirty-six, and longer.

Mr. Gordon: Yes. That's all.

Mr. Sellick: That's all.

The Deputy Director: Thank you, Doctor.

Does the respondent rest?

Mr. Sellick: Yes.

(318) The Deputy Director: Off the record.

(Discussion off the record.)

Mr. Sellick: For the record. If counsel thinks it is something important to his case, I have no objection.

Henrietta Kream, Petitioner (Recalled)
—Re-direct—Re-cross.

HENRIETTA KREAM, the petitioner, recalled as a witness on her own behalf, having previously been sworn, testified further as follows:

Re-direct examination by Mr. Gordon:

Q. Mrs. Kream, do you know what time your late husband, Harry Kream, left, or, about what time he left the house for his job on the morning of February 2, 1952? A. I would say, around nine o'clock—9 A. M.

Q. And did you see him before he left that morning? A. Yes.

Q. Did you give him his breakfast? A. I did.

Q. Will you tell Judge Lorenz what condition he appeared to be in, from your observation that morning? A. Well, I'd say he was in very good condition. He felt very good. He ate very good and he appeared to be very happy that morning when he went to work.

Q. Did he have any complaint to make to you that morning of any kind? (319) A. No.

Q. And prior to that, the entire time that you were married to him, what were you observations of his physical condition? A. I would say, very good, other than a cold——

Q. And outside of having colds he was in good health; is that right? A. Yes.

Re-cross examination by Mr. Sellick:

Q. You do know that he was in a hospital some years ago for an operation; don't you? A. Yes, he was.

Q. Was that before you were married to him? A. Yes.

Q. Is it your testimony that he never had had any time away from work while you were married to him on account of any illnesses? A. Other than a cold.

Q. That's the only one you know about? A. Yes.

Henrietta Kream, petitioner (recalled)—Re-direct.

Q. You don't know about the time he was in St. Michael's Hospital? A. No.

Q. Wasn't that when you were married to him? A. No.

(320) Q. Did you ever know he was in St. Michael's Hospital? A. No.

Mr. Sellick: That's all.

Re-direct examination by Mr. Gordon:

Q. From your observation, or—strike that. Did he ever complain to you, specifically, now, about heart pains of any kind?

Mr. Sellick: Your Honor, I object. That's surely leading.

By Mr. Gordon:

Q. Did he ever make any complaints to you about any illnesses other than colds as you have told us? A. No.

Mr. Gordon: That's all.

Mr. Sellick: That's all.

The Deputy Director: That's all.

(Witness excused.)

The Deputy Director: Both sides resting?

Mr. Gordon: Yes.

Mr. Sellick: I would like to make a motion for the record, Your Honor.

The Deputy Director: On the record?

Mr. Sellick: Yes, on the record.

It is up to the petitioner to prove by a preponderance of the credible evidence, as Your (321) Honor knows, and I will not attempt to argue the matter unless Your Honor wants to hear us off the record, but on the question of law——

Discussion on Motion to Dismiss.

Mr. Gordon: If this is the same motion as was made at the conclusion of the petitioner's case, I will concede that counsel is making the same motion, now, without the necessity of repeating that lengthy argument.

The Deputy Director: Off the record.

(Discussion off the record.)

Mr. Sellick: I will state that I will keep this as short as possible and I will not cite a lot of cases like I did before, but I do want to repeat: The allegation in this case and according to the claim petition was that the decedent became ill on his tour of duty. He was required and directed to drive his bus in that condition until he was relieved. That was the assumption; that was the accident that they contended and which we are defending against. I have already pointed out to Your Honor that the complaint—the pretrial order—the wording of the decision by Judge Cafiero in the upper court, passed on that and they failed to prove it and there is a legal decision unrepealed and unreversed in this State on that particular point. In (322) addition to that, as I have noted in the trial of this case and cited various cases and I also pointed out, Your Honor, the Lohndorf case, how because a man works when he is sick doesn't make it a compensable accident.

Now, in addition to that, if Your Honor please, I notice as the case went along they seem to appear to try to—the case seemed to be conducted by the petitioner, as I gather it, that the driving of the bus was an additional insult to his original condition, although they don't contend that that condition itself was cause by the alleged accident. Now, I don't think

that the law in our State makes that a compensable accident.

In addition to the authorities that I have already given to you, I would just like to quote from the case of Di Maria *vs.* Curtiss Wright Corp., 134 N. J. L., 524. That's the old supreme court, confirmed by the Court of Errors and Appeals, 135 N. J. L. 470. In that case it was said—the opinion of the Common Pleas discusses the fact that the employee's system was peculiarly susceptible to vibration. Assuming such to be the case, that merely goes to the extent of the injury sustained and has no bearing (323) upon whether an accident within the meaning of the Act was sustained. That case, as far as I know, was unreversed; no unusual effort of strain in this particular case and just because there is another illustration——

The Deputy Director: Is that the hand case?

Mr. Sellick: I think it is a Parkinson's disease case. I'm not sure, Your Honor. Maybe it was the hand case.

The Deputy Director: But it wasn't a heart case?

Mr. Sellick: No, it wasn't a heart case, but the point is, just because a man is susceptible to a condition, the courts have said: "That doesn't make it a compensable accident." That's my point. He can't prove an accident just because he is susceptible to a particular condition. That might go to causal relationship, but it still leaves you with the premise of no accident. That is one of my motions: That the petitioner as a matter of law has failed to prove a compensable accident. My second motion as a matter of law, is failure to prove notice. I know Your Honor ruled on that and I'm repeating it on the record. Counsel's answer to that was, as I understand it, we

knew that the man had died on that particular day and he seemed to think that that was enough of a notice (324) and I say, that if our Statute under 34:15-17 is now in the condition that if we know an employee dies during office hours, if we're immediately put on notice or knowledge by that, that he suffered an injury by accident during his employ, I don't think that 34:15-17 has much practical effect in the Act, so I repeat my argument on notice.

In addition to that, if Your Honor please, I repeat my argument on the res judicata, estoppel, election of remedies, waiver and renunciation. I won't be lengthy in this. You took the position in this case that that matter was decided by Deputy Director Wegner. You, more or less, went along with his ruling although I don't know whether you made a personal ruling on that particular phase of it.

Now, calling attention to Deputy Director Wegner's order, I would say that that the petitioner's case was argued on a hot summer day last summer and I have the exact date here and I think Mr. Gordon will bear me out. I know that Mr. Reid, here is very good about those matters, as he has the time when the particular argument started, which is at 11:10 A. M.—and if I am mis-stating the facts, Mr. Gordon will put me straight on this: That date was July 14, 1954. (325) That was a regular trial date. There were quite a few doctors and lawyers here, and everybody else, and it had been adjourned several times and it came up on that particular day. We didn't get started until 11:10, according to Mr. Reid's note—and I have no doubt that that is right, inasmuch as he writes it down all the time, and just before we got started, or as we got started, there came a message from Trenton that the Compensation

Bureau should shut down that particular day because of the very warm weather and we were asked to make our argument as short as possible. I do state that because I think, in justice to Deputy Director Wegner, the authorities were cited—and I know Mr. Gordon wasn't able to make as long an argument as was stated that day by me. I just state that as a matter of history on the notice.

Now, Deputy Director Wegner in his ruling, treated the case in the upper court on just one allegation: On the first page of his argument he says: "* * * alleging that the Public Service was negligent in that it failed to furnish immediate medical attention after having knowledge of the decedent's condition."—I say, that I think the complaint and pre-trial orders—of the other papers that I have mentioned in Judge Cafiero's ruling, will bear out that there is (326) another issue in there that has been legally determined in this case. I don't know that I have to repeat anything that I have said, and I respectfully request, on the basis of the argument that this claim petition should be dismissed as a matter of law on the basis of the six grounds heard.

The Deputy Director: I don't think you need to answer this because this is, in substance, a repetition of the other motion at the end of the petitioner's case on which I have already ruled. Motion denied.

Off the record.

(Discussion off the record.)

(Summation by Mr. Gordon and Mr. Sellick.)

(Off the record.)

The Deputy Director: Decision reserved.

Exhibit P-1.

Stipulations.

It is hereby stipulated by and between the parties that:

(1) The decedent, Harry Kream, was employed by the respondent on February 2, 1952, during the time he was driving respondent's bus on that day and that his weekly wages were $78.76—gross.

(2) The petitioner, Henrietta Kream, is the widow of said decedent, Harry Kream, and his sole and only dependent. The allegation in paragraph 5 of the Claim Petition that Dora Clark was also a dependent of said decedent is hereby withdraw and it is stipulated that she was not a dependent of said decedent.

(3) The compensation rate payable to the petitioner Henrietta Kream, in the event of liability, is the maximum rate, namely, $25.00 per week.

(4) The Transcript of Testimony, which has already been filed with Deputy Director Wegner of the Division of Workmen's Compensation, covering the testimony of the witnesses Edward J. Wayda and Fred Ulbrich given in the Essex County Court (Docket #95567) in the case of Henrietta Kream, Administratrix of the Estate of Harry Kream, deceased, Plaintiff, *vs.* Public Service Coordinated Transport, Defendant, shall be received in evidence as petitioner's proof on the factual situation covered by their testimony together with answers to such additional pertinent questions to these two witnesses as the Deputy Director may allow either party to ask at trial. Petitioner may offer other factual proof.

(5) The respondent consents that the autopsy report of Dr. Homer D. Schaaf, Assistant Medical Examiner, covering the autopsy of the decedent made on February 2, 1952, shall be admitted into evidence as petitioner's exhibit.

Exhibit P-1.

(6) These Stipulations shall not preclude the respondent from offering contra factual or medical evidence in presenting its case.

We hereby consent to the foregoing Stipulations.

MILTON ALBERT,
Attorney for Petitioner.

DAVID M. SELLICK,
Attorney for Respondent.

Dated: October 15, 1954.

Exhibit P-2.

8 Excerpts from Autopsy Protocol.

(See Opposite ☞)

(P-2/1)

THIS BLANK FOR CORRECTING OR AMENDING CERTIFICATES OF BIRTH OR DEATH

PENALTY FOR FALSE STATEMENT FIVE HUNDRED DOLLARS ($500.00).

4-5941

To the BUREAU OF VITAL STATISTICS, NEWARK, N. J.:

The undersigned requests that the following corrections or additions be made to the original certificate of death (Birth or death) of Harry Kream (Name on original certificate)

who died (Was born or died) on Feb. 2, 1952, (Date of event) in Newark, N.J. (Place of birth or death)

FACTS TO BE CORRECTED (as "name," "date of birth," "cause of death," etc.)	FROM (as given on original)	TO (correct facts)
Cause of death	"Motor vehicle accident, collision of pleasure car and building, driver; occlusive coronary arteriosclerosis; laceration of lip."	"Motor vehicle accident, collision of pleasure car and building, driver; occlusive coronary arteriosclerosis; laceration of lip; accidental death."

Witness J. R. Quinley

Address 140 Roseville Ave, Newark NJ

Date February 6, 1952

Signed Harold A. Kream MD

(Signature of parent or Attendant if Correcting a Birth record or of Physician, Coroner, Undertaker or Informant if correcting items given by them on a death certificate.)

City Hospital Newark N.J.

(Address)

Form AC 51 10M 6-49 CSB20

2

Write Plainly with Unfading Ink. This is a Permanent Record. MARGIN RESERVED FOR BINDING

Exhibit P-3.

Transcript of Testimony of Witness Edward J. Wayda.

ESSEX COUNTY COURT

LAW DIVISION.

Docket No. 95567.

HENRIETTA KREAM, administratrix of the Estate of Harry Kream, deceased, Plaintiff, *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, Defendant.	Civil Action.

Newark, New Jersey
March 2, 1954.

Before:

HONORABLE A. J. CAFIERO, *J. S. C.*, and a jury.

Appearances:

MILTON ALBERT, by AARON GORDON,
attorney for the plaintiff.

LUKE A. KIERNAN, JR., by HERMAN WILLE, JR.,
attorney for the defendant.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

(2) EDWARD J. WAYDA, sworn.

Direct examination by Mr. Gordon:

Q. Mr. Wayda, you are presently employed by the Public Service Coordinated Transport, the defendant in this case, as a bus driver? A. Yes, sir.

Q. Would you be kind enough to bring your voice up, if you don't mind. A. Yes.

Q. How long have you been in the employ of the Public Service? A. Five years.

Q. Inclusive of today? A. That's right.

Q. Did you know the plaintiff's decedent, Harry Kream? A. I did.

Q. By the way, you were interviewed, were you not, on March 15, 1952 by Mr. Joseph Babitz, an attorney at law of this state? A. Yes, sir.

Q. For whom you signed a statement, isn't that correct? A. Yes, sir.

Q. That was taken where? At your home? A. No, at the garage.

Q. At the Public Service garage? Where?

Mr. Wille: This is an unusual examination. I don't see any purpose of the statement taken in March, whatever year it was. Certainly it is not material to the issues in this case, on which basis I raise an objection.

(3) The Court: Will the reporter read the question.

(The pending question is read by the court reporter.)

Mr. Gordon: I have an answer if your Honor wants me to answer the objection. I cannot see where the objection is well taken. This is preliminary.

Note

Page 255a (Exhibit P-2):

Sheet 1 follows;
Sheet 2 through Sheet 8
are on Card 5.

F 10M 11-47

P-2 pgs (P-2/2)
3/16/55 mm mm

OFFICE OF THE CHIEF MEDICAL EXAMINER

OF THE COUNTY OF ESSEX, NEW JERSEY

TIME STAMPED
11 52 PM

DISTRICT ----------

NOTICE OF DEATH

CASE No.
45959

Reported by NCH Grm : Dr. Tierney

---------- Precinct No. ----------

Name of Deceased H. Kneans

Residence 374 Seymour Ave

Age 49 Nativity ----------

Color W Civil Condition ----------

Occupation Bus Driver - P.C.

Date of Death 2-2-1952

Place of Death H25 Hawthorne Ave

Body now at Mullins

Reported cause of death Suicide

Body claimed by ----------

Residence ----------

Body Identified by ----------

Residence ----------

Dr. C. V. Tierney

Remarks: Pennys - $1.82 Quarters 1.50
Half dollar - 1.50 Dimes 1.70 Nickels $3.50
(1) one dollar bill - (1) wrist watch - one ring
1 eye glasses, 3 keys, 1 lighter, 1 change
purse, + garter C. Tierney MD

OFFICE OF THE CHIEF MEDICAL EXAMINER

OF THE COUNTY OF ESSEX, N. J.

(P-2/3)

CASE NO. 45989

MEDICAL EXAMINER'S REPORT OF AUTOPSY: ("If the cause of such death shall by examination be established to the satisfaction of the medical examiner in charge, he shall file a report thereof in the office of the chief medical examiner. If, however, in the opinion of such medical examiner, an autopsy is necessary, the same shall be performed by the chief or an assistant medical examiner.")

I herey certify that I, Homer D. Schaaf, M.D., have performed an autopsy on the body of Harry Kream at Mullin's Morgue. on the 2 day of February 1952 (2:45 PM) ----- 2 ----hours after the death, and said autopsy revealed Motor Vehicle Accident; collision of pleasure car and building; occlusive coronary arteriosclerosis; laceration of lip; driver; accidental death.

Homer D. Schaaf

Homer D. Schaaf, M.D.

Chief Medical Examiner — Assistant Medical Examiner

SYNOPSIS OF HISTORY

(If a Medical Examiner's Report of Death is attached do not write in this space.)

Residence: 374 Seymour Ave., Newark, N.J.

Reported and pronounced dead by Dr. Tierney, City Hospital Ambulance Surgeon, February 2, 1952 - about 12:40 PM - opposite 478 Hawthorne Avenue, Newark, N.J.

History:- Driving car; suddenly went out of control, crashing into building. DOA of ambulance doctor. Bleeding from mouth.

PRESENT AT AUTOPSY

IDENTIFICATION

Approximate age: 49 Height: 5' - 6" Hair: Black, with few gray hairs over temples. Sex: Male

Color: White Weight: 150 lbs. Eyes: Brown

Identified as the body of:

By

In presence of:

Specimens taken: For microscopic examination; brain for alcohol.

PATHOLOGICAL - ANATOMICAL SUMMARY

PRIMARY CAUSE OF DEATH

Coronary arteriosclerosis, severe, occlusive.

EXHIBIT P-1 MAR 2 1954 W. F. ANDRUS

SECONDARY OR TERMINAL LESIONS

HISTORICAL LANDMARKS

AUTOPSY PROTOCOL (P-2/4) CASE No. 45989

A. EXTERNAL EXAMINATION

1. CLOTHING

Bus driver's uniform.

2. FRAME, NUTRITION, SKIN, RIGOR, LIVIDITY, DECOMPOSITION, IDENTIFICATION MARKS MUSCLES, BONES, JOINTS & ANOMALIES

Middle-aged white male; medium frame; good nutrition. No anomalies. Anterior surface of body pale, except for faint, mottled cyanosis of neck and upper chest. Purple lividity posterior surface.

Body warm, no rigor; slight cyanosis nail beds; no clubbing or edema.

Old rounded scar over right shin.

Tattoo - right forearm. No other identifying marks.

3. EYES

Pupils round, equal, moderately dilated; no hemorrhage.

4. MOUTH

3/4" laceration of inner surface of upper lip in midline. Moderate amount of stringy blood in mouth and throat. Flecks and streaks of dried blood around mouth.

Upper and lower full plates. Upper central incisors are chipped and a fragment is lying loose under the upper lip.

5. GENITALS

No penile scars. Normal male.

6. MARKS OF INJURY

Laceration of lip - See No. 4.

No other marks of injury.

AUTOPSY PROTOCOL CASE No. 45989

B. INTERNAL EXAMINATION

TOPOGRAPHY OF ABDOMEN

7. PANNICULUS, DIAPHRAM, GENERAL ABDOMINAL TOPOGRAPHY AND LESIONS

Abdomen flat; panniculus 1"; lemon yellow; recti free and clear. Increased amount of intra-abdominal fat. No odor. No distention of gut or stomach; serosa pale, smooth, glistening, free and clear. Few adhesions between sigmoid colon and lateral wall and superior surface of liver and diaphragm. No free fluid. Normal organ relationship. Diaphragms at 5 and 4.

I. THORAX

8. TOPOGRAPHY Symmetrical. No hemorrhage or fractures, free and clear.

9. PLEURAL CAVITIES

No fluid or adhesions, free and clear.

10. MEDIASTINUM, THYMUS, ETC.

Free and clear. Lungs 1" apart at 3rd rib. Apex of heart at 5th intercostal space in midclavicular line.

11. PERICARDIUM

Thin-walled; pale, smooth, moist inner surface. Heart lies free.

12. HEART, RIGHT SIDE

Atrium moderately distended with dark fluid blood and clots; tricuspid valve 3F; endocardium, valves and myocardium free and clear; foramen closed.

13. HEART, LEFT SIDE

Atrium contains increased amount dark fluid blood and clots. Mitral valve 1⅔ fingers, not sclerosied; some soft whitish-yellow plaque formation on anterior leaflet; chordae tendineae thin, free and clear. Small amount of soft plaque formation on aortic cusps; valve otherwise free and clear; endocardium free and clear; myocardium flabby, dark red, not thickened (measures 11mm). No areas of scarring or softening.

Heart weighs 350 g.

14. AORTA

Moderate patchy, white, soft plaque formation. Ostia slightly compromised.

15. CORONARY ARTERIES

Moderate to severe eccentric and concentric thickening throughout with calcification. One area of complete occlusion in upper left anterior descending branch. Another area of occlusion in a

16. LEFT HILUM - BRONCHI, PULMONARY VESSELS AND BRONCHIAL NODES (1-24)

Larger bronchi contain moderate amount of stringy aerated blood; vessels and nodes free and clear.

17. LEFT LUNG Weight 400 g.

Normal volume. Dark blue-gray surface; dependent congestion; no nus or consolidation.

18. RIGHT HILUM

Do

19. RIGHT LUNG Weight 450 g.

Do

20. THORACIC CAGE AND PARIETAL PLEURA

Free and clear.

II. ABDOMEN

21. SPLEEN Normal size and configuration: dark bluish-gray surface: smooth; dark red on section with normal markings.

22. LEFT SUPRARENAL

Free and clear.

23. LEFT KIDNEY Normal size and configuration; capsule strips with ease revealing smooth, dark purple surface; normal cortico-medullary; pelvis free and clear.

Weight 150 g.

24. RIGHT SUPRARENAL

Do

25. RIGHT KIDNEY

26. DUODENUM, BILE DUCTS AND PANCREAS

Duodenum contains small amount yellow-green mucoid material; mucosa free and clear; no bile block; pancreatic tail is slightly enlarged; parenchyma is pale, brownish-gray, firm and well packed.

27. STOMACH AND ESOPHAGUS

Stomach contains about 1 pint yellow-white fluid chyme. Sour odor. Mucosa and wall free and clear.

Esophagus free and clear.

28. LIVER AND GALL BLADDER

Liver is moderately enlarged, normal configuration; smooth, purplish-brown surface with faint ochre mottling. Section moist, with mottling similar to that of surface. Markings are faint.

Gallbladder free and clear.

29. MALE GU ORGANS - BLADDER, PROSTATE, PENIS, TESTES AND SEMINAL VESICLES

Bladder is almost empty; contains about 1/2 ounce cloudy amber urine; mucosa slightly hyperemic; otherwise free and clear.

Prostate firm, pale, free and clear.

30. FEMALE GU ORGANAS - BLADDER, UTERUS, TUBES, OVARIES, VULVA AND VAGINA

31. ABDOMINAL AND PELVIC CAVITIES

Moderate amount of yellow plaque formation in descending aorta with 1 area of ulceration just below arch. No psoas hemorrhage, free and clear.

32. SMALL INTESTINE

Grossly normal. Not opened.

33. LARGE INTESTINE

To

III. HEAD

34. SCALP

No evidence of old or recent injury.

35. CALVARIUM Slightly thinner than normal. No fractures.

36. DURA MATER

Free and clear.

37. CEREBUM, PIA-ARACHNOID, CORTEX, PARENCHYMA, BASAL GANGLIA, VENTRICLES AND BASAL VESSELS

Brain well fills cranial cavity. No odor. No edema. Normal markings.

No hemorrhage, areas of softening, or cavity formation.

Vessels somewhat small and thin, with slight amount of patchy sclerosis.

38. PONS, CEREBELLUM AND MEDULLA

Free and clear

39. SKULL AND ACCESSORY SINUSES

No fractures, free and clear.

40. SPINE AND SPINAL CORD

Anterior surfaces dorsal and lumbar vertebrae free and clea

IV. ORGANS OF MOUTH AND NECK

41. BUCCAL CAVITY, NASOPHARYNX, PHARYNX AND ESOPHAGUS

For lip laceration and hemorrhage, see No. 4.

42. LARYNX, TRACHEA AND THYROID

V. BONES AND JOINTS

43. BONE MARROW, BONES AND JOINTS

P-4 3/16/55 Pg. one. "

(P-4/11)

[redacted] Safety 24 Blue

This is to certify that the following correction was filed in the Office of the City Clerk.

PENALTY FOR FALSE STATEMENT FIVE HUNDRED DOLLARS ($500.00)

BUREAU OF VITAL STATISTICS, NEWARK, N. J.

The undersigned requests that the following corrections or additions be made to the original

[redacted] of Harry Kroon
(Birth or death) (Name on original certificate)

[redacted] on Feb.2,1952 in Newark,N.J.
(Date of event) (Place of birth or death)

[redacted] TO BE CORRECTED
(Name, "date of death," etc.)

	FROM (as given on original)	TO (correct facts)
[redacted]	"Motor vehicle accident, collision of pleasure car and building, driver; occlusive coronary arteriosclerosis; laceration of lip."	"Motor vehicle accident, collision of pleasure car and building, driver occlusive coronary arteriosclerosis: laceration of lip; accidental death"
[redacted]		
[redacted]		
[redacted]		

[redacted] Signed Homer D.Schaaf, M.D.
(Signature of parent or Attendant if Correcting a Birth record or of Physician, Coroner, Undertaker or Informant if correcting items given by them on a death certificate.)

[redacted] 116 Roseville Ave., Newark
[redacted] City Hospital, Newark

[redacted]

CITY CLERK

[redacted] Safety 24 Blue

This is to certify that the following correction was filed in the Office of the City Clerk.

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The undersigned requests that the following corrections or additions be made to the original

[redacted] of Harry Kroon
(Birth or death) (Name on original certificate)

[redacted] on Feb.2,1952 in Newark
(Date of event) (Place of birth or death)

[redacted] TO BE CORRECTED
(Name, "date of death," etc.)

	FROM (as given on original)	TO (correct facts)
[redacted]	Aug.10,1900	Aug.10,1901
[redacted]	51-5-23	50-5-23
[redacted]		
[redacted]		

[redacted] Signed Arthur Barrish
(Signature of parent or Attendant if Correcting a Birth record or of Physician, Coroner, Undertaker or Informant if correcting items given by them on a death certificate.)

[redacted] Feb.6,1952 [redacted] Clinton Ave., Newark 8, N.J.

[redacted]

CITY CLERK

(P-4/27)

EXHIBIT

MAR 3, 1971 W. F. KINDRICK

SAFETY

CITY OF NEWARK, N. J. No. 36019

OFFICE OF

HARRY S. REICHENSTEIN, City Clerk

REGISTRAR, BUREAU OF VITAL STATISTICS

This is to Certify that the following is correctly copied from a record of Death in my office.

DO NOT ACCEPT THIS CERTIFICATE UNLESS THE RAISED SEAL OF THIS BUREAU IS AFFIXED THEREON.

NAME OF DECEASED	PLACE OF DEATH	DATE OF DEATH
3 Harry Ehrm	476 Hawthorne Ave.	Feb.2,1952

SOCIAL SECURITY NUMBER	SEX	COLOR	MARITAL CONDITION	DATE OF BIRTH	AGE YRS.	MOS.	DAYS
141-03-1166	M	W	Married	Aug.16,1900	51	5	15

PLACE OF BIRTH	CAUSE OF DEATH
N.Y.C.	Motor vehicle accident; collision of pleasure car [illegible] driver; occlusive coronary arteriosclerosis; laceration of [illegible]

SUPPLEMENTAL INFORMATION IF DEATH WAS DUE TO EXTERNAL CAUSES

ACCIDENT, SUICIDE OR HOMICIDE: Natural — DATE OF OCCURRENCE: Feb.2,1952

WHERE DID INJURY Ooccur? Newark (CITY OR TOWN) Essex (COUNTY) N.J. (STATE)

DID INJURY OCCUR IN OR ABOUT HOME, ON FARM, IN INDUSTRIAL PLACE, IN PUBLIC PLACE? pleasure car (SPECIFY TYPE OF PLACE)

WHILE AT WORK? No — MEANS OF INJURY driving car; collided & [illegible]

NAME OF PERSON WHO CERTIFIED CAUSE OF DEATH	ADDRESS
Homer D.Schnaf, A.M.E.	City Hospital, Newark, N.J.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the Bureau of Vital Statistics, Newark, N. J. this 25 day of Feb. A.D. 19 52

H S Reichenstein

City Clerk, Registrar of Vital Statistics

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

The Court: Unless it becomes necessary that this witness shows hostility which would lead you to draw upon it, I see no necessity for it. I will sustain the objection.

Q. Mr. Wayda, did you report for duty on February 2, 1952 at 16th Avenue and 19th Street, at the garage of the Public Service? A. I did.

Q. At what time did you report there? A. 10 o'clock roll call.

Q. Pardon? A. 11 o'clock roll call.

Q. Were you sent out at any time that morning to relieve the plaintiff's decedent, Harry Kream? A. I was.

Q. About what time was that? A. Around 11:37.

Q. Around 11:37. Was that in the morning? A. That's right.

Q. Mr. Wayda, who sent you out to relieve Harry Kream? A. Mr. Ulbrich.

(4) Q. Your boss? A. That's right.

Q. Does he spell his name U-l-b-r-i-c-h? A. That's right.

Q. He is the stationmaster at this garage of the Public Service on 16th Avenue and 19th Street? A. Yes, sir.

Q. What did Mr. Ulbrich say to you before he sent you out to relieve Harry Kream?

Mr. Wille: If the Court please, I do think that would be hearsay and objectionable.

The Court: Isn't it hearsay?

Mr. Gordon: Of course not. If Your Honor please, this is testimony which this man gives of instructions given by the superior. After all, Public Service is an artificial person, a corporation. A corporation deals through its agents. Here is a man

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

who is the stationmaster at this garage—Kream's boss, his boss. He gives him orders to go and relieve Kream. He has a perfect right to testify as to what Ulbrich told him.

The Court: I think you are privileged to ask did he receive instructions and then you can ask him what did he do.

Mr. Gordon: It may also be considered in the nature of a declaration against interest, an (5) exception to the hearsay rule, because when this man Ulbrich sent him out, he sent him out for a reason and we have a right to elicit that reason from this witness. We are not dealing with a bus driver, if your Honor please, but we are dealing with Ulbrich who is the stationmaster.

The Court: Do you intend calling Mr. Ulbrich as a witness?

Mr. Gordon: Yes.

The Court: For the time being I am going to sustain the objection.

Mr. Gordon: I listened to what counsel had to say about Mr. Ulbrich. At this time I know I will have to plead surprise if Mr. Ulbrich testifies as counsel indicated to the jury, because we also have a statement from Mr. Ulbrich. Then I would have to put this witness back to prove the facts through him which we could not prove through Ulbrich. Therefore, I would like to prove it now through him.

The Court: For the time being I will sustain the objection. You may ask this witness what he did.

Mr. Gordon: Will your Honor give me the benefit of noting my objection on the record?

The Court: Of course.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

(6) By Mr. Gordon:

Q. Did you receive instructions from Ulbrich? A. I did.

Q. What were those instructions?

Mr. Wille: May I object again? My objection still stands. I have no objection to what he did with reference to the instructions.

The Court: Yes. Sustained. You may ask him as the result of that what did he do. Suppose you follow it with that next question.

Mr. Gordon: Except that I would like to have the benefit of the objection to your ruling on that question pursuant to where the objection was made by my adversary.

The Court: For the time being I am going to sustain the objection. As I said, if it develops during the course of the trial as the result of any testimony that may be given and it may become necessary for you to refute the testimony, I will permit you to do so. In the meantime you may ask this witness as the result of that what did he do.

Q. As the result of the instructions you received from Mr. Ulbrich what did you do? What did you proceed to do? A. I got my carrier and proceeded to 19th Street to make a relief, to 19th Street and 14th (7) Avenue.

Q. You got your what? A. My change carrier and proceeded.

Q. That contraption you wear on your chest or belt to make change? A. That's right.

Q. You proceeded to where? A. 19th Street and 14th Avenue.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

Q. Will you tell us what you found at 19th Street and 14th Avenue. A. I waited a few minutes for the bus to come up because it is only a three-minute walk.

Q. It is a three-minute walk from the garage to this point where you were to meet the bus. Is that right? A. That's right.

Q. Who was in that bus? A. Harry Kream.

Q. Was he driving it? A. That's right.

Q. Will you tell us what you saw and observed about Kream when he drove his bus up and got out of the bus. A. He was seated at the time I approached him and marked in his card. We have a day card.

Mr. Gordon: I can't hear him.

The Court: Talk loud enough so that the last juror can hear you and the last attorney. It is not necessary that you shout.

A. (Continuing) He was finishing off his card that we (8) have as a record in the bus, and then he got up and stepped out of the bus and I seen he was sweating.

Q. How did he get out of the bus? A. He walked out.

Q. Was there anything about his walk that was out of the ordinary? A. No, sir.

Q. There was not. You were able to see him as he came out of the bus? A. Yes, I stood right at the step.

Q. Did he walk as you or I would walk out? Is that what you are telling us now? A. That's right.

Mr. Gordon: Now, if your Honor please, I claim surprise in that I have a statement which was signed by this man when this case was investigated at my direction within six weeks after this happened, and I didn't hire an ordinary investigator; I hired an attorney.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

Mr. Wille: I object to a speech at this time. I think he is not allowed to testify. I submit that he be instructed not to do that, your Honor.

The Court: Suppose you state your reason.

Mr. Gordon: I have a statement, if your Honor please, signed by this man, made and signed by him, in which he stated that he immediately noticed——

(9) Mr. Wille: Just a minute.

The Court: Counsel evidently has a right to object.

Mr. Wille: I object to his reading the statement. If he wants to confront the witness with the statement, I have no objection. He is testifying at the present time. I object.

The Court: In all probability counsel is trying to save time, but that isn't necessary. I think you should prove the statement by seeing whether the witness says it is his signature.

By Mr. Gordon:

Q. Would you look at this statement, sir, and tell us whether the signature at the bottom of it, Edward J. Wayda, No. 3865, is yours. A. That's my signature.

Q. That was signed on what date? A. March 15, 1952.

Q. That was within five and a half weeks after the accident, was it not? A. That's right.

Q. Do you recall the circumstances under which that statement was given by you?

Mr. Gordon: By the way, stand up, Mr. Babitz.

Q. Do you know Mr. Joseph Babitz, an attorney of this state? A. That's right.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

Q. Do you know that he was the man who wrote your
(10) statement down? A. Well, I couldn't recognize him at that time when this other fellow arrived at the point.

Q. Didn't Mr. Babitz interview you on March 15, 1952? A. I don't remember.

Q. Do you remember now? A. Yes, sir.

Q. You remember him now as the man who interviewed you on March 15, 1952. Is that correct? A. Yes.

Q. Did you tell him what happened in connection with Harry Kream? A. I told him just—yes.

Q. Look at that statement, sir, which you signed and will you read it to yourself, and after reading it tell me if that statement refreshes your recollection as to what you said within less than two months after the death of Harry Kream. Read it over carefully to yourself.

Have you read it? A. Yes, sir.

Q. Is that what you stated to Mr. Babitz? A. No, sir.

Q. It is not what you stated to Mr. Babitz? A. That's right.

Q. Did you read the statement? A. No, sir.

Q. You did not read it? A. No, sir.

Q. You signed it without reading it? A. That's right.

(11) Q. Who subpoenaed you to testify here in court in behalf of the plaintiff?

Mr. Wille: I cannot see the materiality of that question.

The Court: I will permit it.

A. Mrs. Kream.

Q. Mrs. Kream? A. Mrs. Kream.

Q. Didn't her attorney of record also accompany her; Mr. Milton Albert, the man who sits here at my left? A. That's right.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

Q. Were you shown your statement at that time? A. Yes, sir.

Q. Didn't you read it over at that time? A. No, sir.

Q. You did not read it over at that time. That was when that you were subpoenaed? A. Last Saturday.

Q. Did you ask him to let you read it? A. No, sir, I didn't.

Q. Weren't you interested in knowing what was in the statement that you had signed? A. I told him just what I told him, and I figured that was enough. That's why I didn't bother.

Q. When Babitz took this statement, did you trust him to put down what you said? A. Yes, sir.

Q. You did. Do you recall being here in court (12) waiting for this case to come up for trial yesterday? A. Yes sir.

Q. Do you recall that I asked to speak to you? A. Yes, sir.

Q. Do you recall that Mr. Wille, the attorney for the Public Service, said to me that I couldn't speak to you unless he was present? A. That's right.

Q. And that I said I had a right to speak to you alone? A. Yes, sir.

Mr. Wille: I object to the question; that is argumentative.

The Court: Yes, that is argumentative.

Mr. Gordon: Isn't it most unusual that one attorney cannot even go to speak to a witness that is under subpoena and that he has to put him on the stand without having an opportunity to speak to him. I can recall, if your Honor please, some years ago being assigned to defend a man being accused of murder——

Mr. Wille: I object to this.

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Edward J. Wayda, for Plaintiff—Direct.

The Court: Anything that may have happened in some other matter is certainly not relative in this particular issue. I would prefer that counsel keep himself with the bounds of this case and not any other case.

(13) Your present question has been objected to. I sustain the objection. Your objection has been noted. Will you now proceed to the next question.

Mr. Gordon: I didn't finish my statement. My adversary interrupted me.

The Court: You are permitted to go forth and question this witness on that statement. The only thing that has been objected to is the last question. I have sustained it. Will counsel proceed. Your last question was yesterday you had asked to speak to him and he said yes, sir.

By Mr. Gordon:

Q. Isn't it a fact that you also refused to speak to me because you had been ordered not to talk to me? Is that right? A. Yes, sir.

Q. You lost a day from work yesterday, did you not? A. Yes, sir.

Q. Who paid you for that day? A. Public Service.

Q. And you are losing a day from work today, isn't that right? A. Yes, sir.

Q. And who is paying you for today? A. Public Service.

Q. You are under subpoena by me? A. Yes.

Q. You are not under subpoena by the Public Service, (14) isn't that right? A. Yes, sir.

Q. When did you first talk to anyone in the Public Service about having given a statement to me or to anyone from my office?

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Mr. Wille: If the Court please, I submit that counsel has pleaded surprise. He is entitled to question the witness on the statement. He is still his witness. I submit he is going outside of the scope of cross examination when he pleads surprise, and I object.

The Court: Counsel raises objection to the method pursued. He pleaded surprise and, of course, I required him to go forth in the manner provided by the rules. You may avail yourself of such questions as you wish to pose to this witness under the theory that you are being surprised by his hostility.

Mr. Gordon: I am proceeding, if your Honor please, in this type of questioning under the following authorities.

The Court: You do not have to cite authorities. I am ruling in your favor.

Mr. Gordon: I wanted to answer my adversary.

The Court: Your adversary has conceded that you are suprised by the testimony of this witness. You may proceed along those lines.

(15) By Mr. Gordon:

Q. Mr. Wayda, did you on March 15, 1952 make a statement to an attorney at law of this state, Mr. Joseph Babitz, who reduced it to writing and you signed it, in which you said as follows.

Mr. Gordon: May I hold that a moment and have this marked for identification?

(The statement referred to is marked Exhibit P-5 for identification.)

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Direct.

Q. Reading from Exhibit P-5 for identification, I will read a sentence at a time. Didn't you state, "On February 2, 1952 at about 11:50 a. m. I was at the 16th Avenue and 19th Street garage of the Public Service Company in Newark, New Jersey, for whom I am an employee"? A. Yes, sir.

Q. You stated that? A. That's right.

Q. Continuing with Exhibit P-5 for identification, did you state, "My supervisor, Fred Ulbrich, told me that when Harry Kream brings in his bus I should take over its operation at 14th Avenue and 19th Street"? Did you say that? A. Yes, sir.

Q. "He told me that Kream had called in from Military Park, that he was ill and that there was no driver to relieve him there, but that Kream should bring the bus to 14th Avenue and 19th Street." You told him (16) that? A. No, sir.

Q. You did not? A. No, [redacted]

Q. Mr. Witness, you can read English, can't you? A. Yes.

Q. And this statement was taken from you voluntarily? Nobody forced you to talk to Babitz, did they? A. No, sir.

Q. Babitz did not offer you any money to give the statement, did he? A. No, sir.

Q. And Mrs. Kream didn't offer to give you any money to give the statement, did she? A. No, sir.

Q. This was taken right in the garage where you work, wasn't it? A. No, in a car.

Q. Whose car? A. Mr. Babitz's.

Q. You were sitting alongside of Babitz? A. No, sir.

Q. Where were you sitting? A. In the rear seat.

Q. You mean you were talking to him from the rear over his shoulder? A. No, not over his shoulder. He was sitting in front writing.

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Edward J. Wayda, for Plaintiff—Direct.

Q. Facing you? A. No, sir.

Q. Did he sit in the front seat all the time? A. Yes, sir.

(17) Q. Then when he finished writing it, did he hand it to you to sign? A. Yes, sir.

Q. He handed it to you in the back seat. Is that right? A. That's right.

Q. He wasn't alongside of you when you signed; he was in front? A. Yes, sir.

Q. You signed it. Is that right? A. Yes, sir.

Q. This is a one-sheet statement, isn't it? A. Yes, sir.

Q. One sheet? A. Yes, sir.

Q. You can read it, can't you? A. Yes, sir.

Q. You read it here on the stand. Why didn't you read it before putting you name down? A. I was only telling him the truth. I figured he wrote it down.

Q. There was nothing to stop you from reading it, was there, according to your own words? A. No, sir.

Q. Babitz told you not to read it, did he? A. No, sir.

Q. He said, "Here is the statement I wrote." Is that right? A. Yes, sir.

Q. When you got it, what did you do? A. I signed it.

Q. You didn't bother taking a look at it, did you? (18) A. No, sir.

Q. Now, did you say this, continuing to read from Exhibit P-5 for identification, "At about 11:55 a.m., the bus being operated by Kream arrived at 14th Avenue and 19th Street"? A. Yes, sir.

Q. You said that? A. Yes, sir.

Q. "I immediately noticed Kream stagger down the steps of the bus." A. No, sir.

Q. You didn't say that? A. No, sir.

Q. You realize that you are under oath? A. Yes, sir.

Mr. Wille: I object to that question.

The Court: I think the witness recognizes he is under oath. It is all right that he be warned accordingly. There is no great harm in that.

Q. After you stated, "I immediately noticed Kream stagger down the steps of the bus," you also stated, "His face was purple and all sweated up."

Mr. Wille: I object to the form of the question.

The Court: Is that the language that is in the statement?

Mr. Gordon: That is the exact language in this statement, and may I say to your Honor I ought to be allowed a lot of leeway with this man. I am calling upon your Honor for protection because the (19) Court of Errors and Appeals said it is the function of a trial lawyer—and I hope I am one—to extract from one whom he accuses of being unworthy of belief—and I will give you the case by name and page because I looked it up last night——

The Court: We won't require any case. The Court is familiar with that principle of law and you will be permitted to go forth as your adversary has conceded that you are entitled. If counsel questions whether or not the statement you may have read is the exact language that appears in that statement, I see no serious damage to that. He merely has sought to ask whether or not that is the statement. Is it the statement?

Mr. Gordon: I was not there when it was taken. I am going to ask to withdraw this witness and put the lawyer on the stand who took this statement.

The Court: I think at this point it might be well if we took a short recess.

(A short recess is taken.)

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Mr. Gordon: If your Honor please, I will withdraw the previous question and reframe it.

The Court: Very well.

Mr. Gordon: In order to pick up the witness's trend of thought, may I read the portion I had read (20) before I asked the objectionable question?

The Court: I don't know that that is necessary. Suppose you pick it up with the next sentence.

By Mr. Gordon:

Q. After stating, Mr. Wayda, in this statement, "I immediately noticed Kream stagger down the steps of the bus," did you state to Mr. Joseph Babitz, "His face was purple and was all sweated up"?

Mr. Wille: I object to the question on the ground that the way it is framed at the present time is objectionable because he says after stating such and such, and the witness has already denied that.

By the Court:

Q. You were asked did you say this, "I immediately noticed Kream stagger down the steps of the bus." A. No, sir.

The Court: Ask him the next one.

By Mr. Gordon:

Q. Did you say to Mr. Babitz this statement, "His face was purple and all sweated up"? A. No, sir.

Q. Did you state, "His lips were blue and his eyes were popped up"? A. No, sir.

Q. Did you state, "I told Harry Kream to call up (21) the company and have someone drive his car home"? A. Yes, sir.

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Edward J. Wayda, for Plaintiff—Direct.

Q. Why did you tell Harry Kream to call up the company and have someone drive his car home? A. Because I noticed he was sweating.

Q. Sweating? A. That's right.

Q. This was in February? A. Yes, sir.

Q. He was sweating? A. That's right.

Q. Where was the sweat coming from? What part of his body? A. On his brow.

Q. What were there? Beads of perspiration there? A. No, sir, just an ordinary sweat.

Q. But not for someone in the month of February outdoors. Is that right? A. That's right.

Q. What else was wrong with him that you said he ought to call up the company and have someone drive his car home? A. I didn't make that statement like that.

Mr. Gordon: Just a moment. May I have that question in which I read that into the question in which he said he said that?

By the Court:

Q. Did you not say that, "I told Harry Kream to call up the company and have someone drive his car home"? A. Yes, sir.

(22) By Mr. Gordon:

Q. There is no doubt about it, that is just what you said? A. Yes, sir.

Q. All that he was doing was sweating. Why would you tell him to call somebody up at the company and drive him home in his car if that's all that was wrong with him? A. Because I knew he had reported in ill.

Q. You knew he had reported in ill where? A. At 16th Avenue.

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Edward J. Wayda, for Plaintiff—Direct.

Q. From where did you know he had reported in ill? A. Mr. Ulbrich explained it to me.

Q. Mr. Ulbrich? A. That's right.

Q. Did Mr. Ulbrich tell you just what his illness was? A. No, sir.

Q. Was there anything else that you noticed about Harry Kream when you relieved him at 19th Street and 14th Avenue besides this perspiration from his forehead? A. No, sir.

Q. Would you say that he was well except for that perspiration from his forehead? A. No, sir.

Q. You would not. In other words, to you he looked sick. Is that right? A. Yes, sir.

Q. Well, now, can you tell us in what way he looked sick to you? A. Well, he was sweating (23) that's why I approached him that way.

Q. Did he look to you to be fit to drive a car or a bus?

Mr. Wille: If the Court please, that calls for a conclusion.

The Court: I will sustain the objection. Suppose you ask him just how he looked and have this witness give us his observation.

Mr. Gordon: And then I may ask in his opinion whether he looked all right.

The Court: Confine yourself to what things he observed.

Mr. Gordon: Under Crosby v. Wells, 73 N. J. L. 790, it holds that a person by experience may know after stating his opportunity to observe another and how he observed him, he may then state whether in his opinion he was or was not in a fit condition to do a certain thing.

Mr. Wille: That refers to intoxication.

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Edward J. Wayda, for Plaintiff—Direct.

The Court: That is an entirely different situation than we have here. Have him testify to his observations and conditions that he was able to discern and learn.

By Mr. Gordon:

Q. Now, you say that the reason you told him to (24) call up the company and have somebody drive his car home is because you knew he was ill. You saw he was ill and he had perspiration coming down from his forehead. Is that right? A. Yes, sir.

Q. On the street. Is that right? A. Yes, sir.

Q. Did you state to Mr. Joseph Babitz when you gave him this statement, "He"—referring to Harry Kream—"said he was going to do it himself and did not want to bother the company"? Did you say that? A. He said he didn't want to be bothered.

Q. Who didn't want to be bothered? A. He said—Harry Kream.

Q. That he didn't want to be bothered? A. Yes.

Q. Doing what? A. To get in touch with anybody; that he would go home himself.

Q. Did you feel that he was too sick to drive his car?

Mr. Wille: That calls for a conclusion not based on facts that he observed. I object to the question.

The Court: I will sustain the objection. I think the question has already been answered. He told him, "I told Harry Kream to call up the company and drive him home." Counsel is just begging the (25) question.

Q. Did you say, and I am reading again, "I say from my three years of experience driving busses, the condition

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that Kream was in, he should have been removed at Military Park and not be made to drive it to 14th Avenue and 19th Street"? A. No, sir.

Q. You say you did not say those things to Mr. Babitz? A. No, sir.

Q. Had you ever met Mr. Joseph Babitz, this New Jersey attorney sitting at the table with me, before March 15, 1952? A. No, sir.

Q. How long were you talking to him on March 15, 1952, before you signed the statement? A. About 15 minutes.

Q. About 15 minutes. So that your entire acquaintance with him was something like 15 minutes duration. Is that right? A. That's right.

Q. He was a perfect stranger to you? A. Yes, sir.

Q. And he gave you the statement where you were sitting in the back of the car for you to sign and you didn't read it. A. No, sir.

Q. Were you curious as to whether a man you didn't know was putting down what you said? A. Mrs. Kream was with him at the time.

(26) Q. Where was she sitting? A. Alongside of him.

Q. She was not doing any of the writng, was she? A. No, sir.

Q. He was doing the writing and he was doing the asking of you. Is that right? A. Yes, sir.

Q. She didn't hand you the paper to sign, did she? A. No, sir.

Q. The lawyer handed you the paper, didn't he? A. I didn't know at that time he was a lawyer.

Q. Well, the man. A. That's right.

Q. He handed you the paper. Is that right? A. Yes, sir.

Q. You had a chance to read the paper before you signed it, didn't you? Yes or no. A. Yes, sir.

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Edward J. Wayda, for Plaintiff—Direct.

Q. Yet you wouldn't read it. A. I didn't bother. I figured what I told him was on there.

Q. It was on there? A. That's right.

Q. In the five years that you have been driving busses for the Public Service, haven't you been told that when there is an accident you get statements from people? A. Yes.

Q. So you are acquainted with the manner in which statements are gotten from people in an accident, aren't you? A. Yes, sir.

(27) Q. Do you know this little book of rules for the Transportation Department employees of the Public Service Coordinated Transport? A. Yes, sir.

Q. That's a rule book that every driver has to become acquainted with. Is that right? A. Yes, sir.

Q. I show you Rule 63 on page 26 of that book and I will ask you to read that and read it out loud. A. "Employees are not allowed to give information concerning an accident to anyone except an authorized Company representative, properly identified.

"Do not make or sign a statement concerning an accident for any police official, insurance representative, or any other person unless by special permission of the Claim Department."

Q. You knew why Mr. Babitz was getting this statement from you, did you not? A. No, sir.

Q. You didn't know that Mrs. Kream was bringing an action against the company for the death of her husband? A. No, sir.

Q. Didn't they tell you that that day? A. No, sir.

Q. What did you think they wanted the statement for? A. She said something about insurance.

Q. What kind of insurance? A. I don't recall.

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Q. Do you feel in view of the fact that Rule 63 of (28) the rules applying to drivers which says that you are not allowed to give information concerning an accident to anyone except an authorized company representative properly identified, that that should have made you hesitate in giving this statement? A. No, sir.

Q. You have told us that they said they were from some kind of insurance company when they got the statement from you. Read the second paragraph out loud of Rule 63 applying to bus drivers.

Mr. Wille: I think this has already been read. It is repetitious.

Mr. Gordon: Not the second paragraph.

The Witness: I read the whole thing.

Mr. Gordon: I am sorry, I thought he had read the first paragraph.

Q. In this second paragraph of Rule 63 does it say, "Do not make or sign a statement concerning an accident for any police official, insurance representative, or any other person unless by special permission of the Claim Department"? A. It does.

Q. Shouldn't that have made you hesitate to make this statement, Exhibit P-5 for identification? A. No, sir.

Q. It should not. In line with the experience which you have had in getting reports of accidents or (29) claims against the company, may I call your attention to Rule 58.

Mr. Wille: If the Court please, before he refers to any more rules, I don't object, but we are getting far afield. Originally counsel was allowed to cross examine this witness because he pleaded surprise regarding the statement. He has gone through the statement word by word. He asked the witness

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Edward J. Wayda, for Plaintiff—Direct.

whether he made the statement. He is going outside of the scope of this cross examination when he is going to the rule book. It has no effect whatsoever on his credibility.

Mr. Gordon: It obviously goes to his credibility because here is a man who is trying to say that he didn't read the statement before he signed it, a statement that he gave to a person that he never met before in his life. He has had a lot of experience with making statements out and with getting statements from witnesses. I am trying to question him with regard to these rules concerning statements, and Rule 58 is a rule which bears the caption "Witnesses." So. if that doesn't go to his credibility, I don't know what goes to his credibility. It certainly does, and I ask leave to pursue the question.

The Court: I will deny the objection. You may (30) proceed.

Q. Will you read that Rule 58 out loud. A. "For your own protection as well as the Company's, secure as many witnesses as possible to every accident, slight or serious."

Q. In other words, for your own protection as well as the company's you were told in this rule to secure as many witnesses as possible to every accident whether it is slight or serious. Is that right?

Mr. Wille: This is repetitious.

The Court: It is repetitious, counsel.

Q. Will you read No. 59 of the rules out loud and slowly. A. "As quickly as possible pass witness cards to everyone in your vehicle and others at the scene of the accident asking each person—'May I have your name for my report, please?'

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Edward J. Wayda, for Plaintiff—Direct.

"Even though the person did not see the accident he can often contribute valuable information."

Q. So you realize, don't you, sir, how important a statement becomes, isn't that right? A. That's right.

Q. And yet despite the fact that Babitz was somebody you didn't know, had never met before that day of March 15, 1952, when you gave him the statement, and despite the fact that he handed it to you in the back (31) seat where you were and didn't tell you not to read it, you didn't read anything you said on here. Is that right? A. That's right.

Q. Mr. Wayda, you know Mr. Milton Albert, the attorney for whom I am trying this case, don't you? He is sitting here on my left. A. Yes. I met him on Saturday.

Q. This past Saturday? A. That's right.

Q. He subpoenaed you. Is that right? A. That's right.

Q. He had this statement with him, didn't he? A. Yes.

Q. He showed it to you then, didn't he? A. Yes, but I didn't read it.

Q. But he showed it to you to read, didn't he? A. Yes.

Q. Why were you afraid to read it on Saturday? A. I was working on my car at the time. I was all greased up.

Q. You didn't want to get the paper dirty. Is that it? A. No, sir.

Q. Did you ask him to hold it up for you so you could see it? A. No, sir.

Q. You didn't offer to read it? A. No.

Q. You just told us he offered it to you to read, (32) but you didn't want to take it because you were all greased up. Which is true? A. He was holding it in his hands. I didn't read it.

Q. How close were you to him? Would you say that you were as close to him as I am to the court reporter here? A. Yes, sir.

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Edward J. Wayda, for Plaintiff—Direct.

Q. In other words, right up against him? A. No, I was in front of him.

Q. Well, but close to him? A. Yes, sir.

Q. A few inches away. Is that right? A. Yes, sir.

Q. Did he hold the paper so you could read it? A. No, sir.

Q. Well, did he read this paper to you? A. He read a part if it to me.

Q. Didn't he read it all to you? A. No, sir.

Q. What part did he read? A. I could show you.

Q. Take it and show us. What part did he read? A. He read this part: "I told Harry Kream to call up the company and have someone drive his car home."

Q. He read that part to you? A. That's right.

Q. Didn't he read the rest of it to you? A. No, sir.

Q. Tell me this, Mr. Wayda: Did you ask him to (33) wait till you could clean your hands off so you could read the statement? A. No, sir.

Q. You didn't ask him that? A. No, sir.

Q. Didn't you think it was important to read that statement Saturday? A. No, sir.

Q. You did not? A. No, sir.

Q. You felt satisfied that what was in that paper when he was there Saturday was the truth. Is that right? A. Right.

Q. That's right? A. That's right.

Q. Now, today for the first time you tell us that what is in this statement is a lie. Is that right? A. Yes, sir.

Q. Did you have a conversation with Mr. Wille, the attorney for the Public Service, between Saturday when you were supboenaed by Mr. Albert and today? A. Yes, sir.

Q. Where? A. In the Public Service office.

Q. When was that? A. Monday.

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Q. In other words, the Monday of this week? A. Yes, sir.

Q. Yesterday? A. Yes, sir.

Q. Did he want to know what was in the statement? A. Yes, sir.

Q. Did you tell him what was in the statement? (34) A. Yes, sir.

Q. Why did you keep looking toward the Public Service lawyer? When I talk to you, why do your eyes shift over toward where the representative of the Public Service is sitting? Why can't you look directly at me when I am asking you questions, sir? Will you look at me directly please. A. Yes, sir.

Q. Did you tell him what was in the statement? A. Yes, sir.

Q. How did you know what was in the statement if you say you never read the statement? A. I knew what I had told him.

Q. You knew what you had told him? A. As of February 2.

Q. As of March 15, 1952? A. Yes, sir.

Q. Two years ago today you know everything you said then? A. Not exactly.

Q. Look at me please. How could you tell him what was in the statement yesterday that you gave on March 15, 1952? A. I told him about what I said.

Q. You told him about what you said? A. Yes, sir.

Q. On Saturday, this past Saturday, when you were subpoenaed, isn't it a fact that Mr. Albert read (35) the entire statement to you with you looking right at it? A. No, sir.

Q. Isn't it a fact that you told him that your hands were full of grease because you had been working on your car

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in front of your house and you did not want to dirty the statement and he should read it to you? A. No, sir.

Q. It is not? A. No, sir.

Q. Did you think it was important for you to read that statement Saturday, have it read to you? A. No, sir.

Q. Did he offer to let you read it? A. No, sir.

Q. And it was there for you to read if you wanted to read it, wasn't it? A. Yes, sir.

Q. You still didn't want to read it. A. No, sir.

Q. What was there in this statement that you wanted to blot out of your mind?

Mr. Wille: If the Court please, I don't think that that is a proper question. He said he didn't know what was in it. I object to it.

The Court: Suppose you reframe it.

Mr. Gordon: I think the question goes to his credibility.

(36) The Court: It is a rather difficult question to answer. Suppose you reframe it.

Q. Is there anything in this statement that you are afraid to read? A. No, sir.

Q. How do you know that if you don't know what was in it? A. Because there is nothing I said I was afraid of.

Q. You had two chances to read the statement, didn't you, when you gave it six weeks after Kream's death and on last Saturday? Is that right? A. That's right.

Q. You had full and complete chance to read it when Babitz handed it to you on March 15, 1952, in the back of the car. Is that right? A. That's right.

Q. He didn't try to stop you from reading it, did he? A. No, sir.

Q. He gave it to you and you had ample opportunity to read it. Is that right? A. Yes, sir.

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Q. And yet you didn't read it before you signed it. A. Yes, sir.

Q. On Saturday, because your hands were dirty, you didn't want to touch that statement although Mr. Albert—Mrs. Kream's attorney—wanted you to read it. Is that right? A. He didn't ask me to read it.

Q. Did he keep it in his bag or did he take it (37) out of his bag? A. No, sir.

Q. Where did he have it? A. Inside his car.

Q. Where? A. In the rear of his car.

Q. In the rear of his car? A. That's right.

Q. Did you go over to the rear of his car? A. I stood by his car.

Q. Didn't you tell us before that he aproached you in front of your house and that you were standing right close to him in front of him, on the sidewalk? A. That's right.

Q. How were you standing right close to him on the sidewalk if he was in his car and he had the statement in his car? A. Because we were outside of the car.

Q. You and he? A. That's right.

Q. Then the statement was taken by him from the back of his car? A. That's right.

Q. You said he read one part of it to you: A. That's right.

Q. He had the whole statement there, this sheet of paper? A. That's right.

Q. You had a chance to read it if you wanted to, didn't you? A. Yes, sir.

Q. Do you have the same job you had with the (38) Public Service back in March 1952 or in February 1952? A. Yes, sir.

Q. The same identical job? A. Yes, sir.

Q. How about the pay? Is it greater today? A. Yes, sir.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Cross.

Q. How much? A. Well, we only had one increase.

Q. What? A. We had an increase.

Q. How much do you earn today? A. About $76.

Q. What were you earning on the day of February 2, 1952? A. About $65.

Q. $65 for the same number of hours? That is the base pay for 40 hours? A. That's right.

Q. The same number of hours in 1952 as today? A. Yes.

Mr. Gordon: That's all.

Cross examination by Mr. Wille:

Q. Mr. Wayda, the pay increase was as a result of contracts negotiated between your union and the company? A. That's right.

Q. Applicable to all bus drivers? A. Yes, sir.

Q. You are a bus driver, aren't you? A. Yes, sir.

Q. You are not an investigator, are you? A. No, sir.

(39) Q. You don't interview witnesses and get statements do you? A. No, sir.

Q. You just drive a bus? A. Yes, sir.

Q. You never had experience with taking of statements from witnesses? A. No, sir.

Q. Mr. Wayda, we seemed to have lost track of what had happened to Mr. Kream after he came out of the bus. My recollection is that he got off the bus and you went on the bus. Is that right? A. Yes, sir.

Q. What was the last you saw of Mr. Kream? A. Walking across the street to get into his car.

Q. Where was his car parked? A. Between 19th Street and 20th on 14th Avenue.

Q. Did you know his car? A. Yes, sir.

Q. Do you recall what year and what type of car it was? A. It is a Buick.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Cross.

Q. Do you remember the year? A. It was either a 1950 or 1951.

Q. Did you observe it parked at the particular spot on February 2 before Mr. Kream came up with the bus? A. Yes, sir.

Q. Now, when Mr. Babitz interviewed you, sir, on March 15, did he tell you that he was a lawyer representing Mrs. Kream?

Mr. Gordon: I object to that. There has been (40) no such testimony brought out on direct examination. The testimony is that Mr. Babitz was my investigator. That is entirely different from being the lawyer representing Mrs. Kream.

Mr. Wille: Counsel is making a big thing because he is a member of the bar.

The Court: Are you through?

Mr. Gordon: I keep getting these interruptions. There is an entirely different classification. The attorney for this lady is Mr. Albert. I am not even her attorney. I am only her trial counsel. Mr. Babitz was my investigator. Sure I say he is an attorney. I purposely got an attorney to go out and investigate this case.

The Court: Mr. Gordon, I think there was frequent reference during the direct examination that Mr. Babitz was an attorney till finally this witness himself said that he didn't know he was an attorney. I think under those circumstances that counsel is permitted to ask the question.

Mr. Gordon: I note my objection.

(The court reporter reads the pending question.)

A. No, sir.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Cross.

Q. You said there was some reference to insurance. Do you recollect whether it was in connection with the (41) claim of life insurance or along that line?

Mr. Gordon: I object to that.

Mr. Wille: This is cross examination.

The Court: There was direct testimony of that.

Mr. Gordon: Insurance?

The Court: Not as to life insurance. I think this witness is permitted to answer that question. He said that this investigation was as a result of some insurance. I will permit it. Objection denied.

Q. Do you recall the question? A. Yes, sir.

Q. Can you answer the question? A. I can't recall.

Q. You can't specifically recall? A. That's right.

Q. But in any event Mr. Babitz asked you questions concerning the accident and you told him what you knew about it. A. Yes, sir.

Q. He wrote it down in his own handwriting; you didn't write on it at all, did you? A. No, sir.

Q. Mrs. Kream was with him? A. Yes, sir.

Q. Did you know Mrs. Kream before this time? A. I met her at the funeral parlor; that was the first time I ever met her.

Q. Because Mrs. Kream was with Mr. Babitz you gave a statement? A. Yes, sir.

(42) Mr. Gordon: I object to that.

The Court: I don't think that is warranted. Let him testify. Rephrase it please, counsel.

Mr. Wille: I withdraw the question.

Q. Considering the instructions you had received from which you read out of the book, Mr. Wayda, will you tell

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Re-direct.

me why you gave a statement, signed a statement? A. Because of Mrs. Kream.

Q. On Saturday—this past Saturday—Mr. Albert came around with a subpoena. Is that right? A. Yes, sir.

Q. He also had in his hand this statement or piece of paper which has been referred to today as Exhibit P-5? A. Yes, sir.

Q. Did he say anything to you about the contents thereof? A. Yes, sir.

Q. What did he say? A. He said there was one part in there I didn't need.

Q. What? A. One part in there he didn't need.

Q. Did he ask you to do anything about it? A. Yes, sir.

Q. What did he ask you to do about it? A. To withdraw it.

Q. Do you recall specifically what part he was (43) talking about? A. Yes, sir.

Q. What part was that? A. Where I told Harry to call the garage; Harry Kream.

Q. Harry said he didn't want to? A. That's right.

Q. Mr. Albert asked you to withdraw that? A. Yes, sir.

Re-direct examination by Mr. Gordon:

Q. Let me ask you this: In here you say that Mr. Babitz put down, "I told Harry Kream to call up the company and have someone drive his car home." Is that right? A. Yes, sir.

Q. Babitz took that down. Is that right? A. Yes, sir.

Q. In Exhibit P-5 you say immediately after this sentence I have just read to you, "He said he was going to do it himself and didn't want to bother the company." A. Yes, sir.

Q. Babitz took that down. Is that right? A. Yes, sir.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Re-direct.

Q. And that's what you said, isn't that right? A. Yes, sir.

Q. Babitz, the investigator, didn't want you to omit that when he was presenting a case, did he? A. No, sir.

(44) Q. He wanted it in there, didn't he?

Mr. Wille: What Mr. Babitz wanted, I object to it.

The Court: There is nothing on cross examination as far as Mr. Babitz is concerned on this line. It was strictly Mr. Albert.

Mr. Gordon: This goes to the credibility of a hostile witness.

The Court: You have the witness on re-direct.

Mr. Gordon: Yes.

The Court: Are you going to start over on an entirely new examination, or re-direct examination?

Mr. Gordon: If I may say this, I am concerning myself with the facts that this man says that a lawyer going to subpoena him on Saturday—the attorney of record for the plaintiff—told him to forget this part in there, when as a matter of fact the attorney who prepared the case upon which we grounded our action upon an investigation, left it in there and this man says that that attorney, Babitz, faked up a statement. Don't you see, I have a right to go into it because the courts have said I have got a right to show, as trial counsel for the plaintiff and I am ready to give you that citation if your Honor wants it——

(45) The Court: I don't require it. You recall your own questions. You stated yourself that Mr. Babitz did not call upon this witness as an attorney. You now tell me that he came into the case for the purpose of its preparation, which are wholly incon-

sistent statements. Mr. Albert prepared the case and it is Mr. Albert whose conduct was questioned on cross examination. I am not going to permit you to go on.

Mr. Gordon: I think your Honor makes a statement that I must say at the very outset in the examination of this man I asked him a question if he didn't know as a fact that Mr. Babitz was an attorney, and I stated that I had retained Mr. Babitz as an attorney to go out and get statements for me. Now, that being so, and it was upon that fact that we grounded our action, haven't I a right to go to affect the credibility of this witness by showing that he is obviously telling an untruth when he says Albert wanted him on Saturday, when he subpoenaed him, to forget something in a statement which Babitz had gotten from him and which, if Babitz was the unholy man that they would have us believe, he could have left out?

Mr. Wille: May I interrupt?

(46) The Court: I am going to interrupt both counsel. You rephrase a new question and I will rule on a new question. There is no point in us going far afield. You are on re-direct examination. Concern yourself to re-direct. I am not going to permit you to open a new avenue of examination.

By Mr. Gordon:

Q. You say that Mr. Albert told you on Saturday, when he gave you a subpoena to make sure you were here in court, that he told you to forget a part of the statement. Is that right? A. Yes, sir.

Q. Do you say that he pointed out to you what he wanted you to forget? A. Yes, sir.

Exhibit P-3.

Edward J. Wayda, for Plaintiff—Re-direct.

Q. Were you then looking at the statement? A. At that part which he read.

Q. Was the whole statement open to you to look at? A. Yes, sir.

Q. But you didn't look at it? A. No, sir.

Q. You say that when Babitz saw you on March 15, 1952 you told him these two things. Is that right? A. Yes, sir.

Q. "I told Harry Kream to call up the company and to have someone drive his car home. He said he was going to do it himself and did not want to bother the company." A. Yes, sir.

(47) Q. And yet you say other things and he left this as you gave it. Is that it? Babitz left the information as you gave it. Is that right? A. Yes, sir.

Q. And yet you say that Babitz went and changed and put other things in the statement that you never said?

Mr. Wille: I object to that. The witness never said that. I object to the form of the question. That is counsel's own conclusion from the testimony.

The Court: That is a recapitulation of the entire testimony that encompasses too large a field. Suppose counsel concerns himself strictly to re-direct examination. I think you have exhausted this line of examination many, many times on direct. I don't see any application for it now. I will sustain the objection.

Q. Mr. Albert had never asked you before Saturday to be here in court, did he? A. No, sir.

Q. Did he ask you to come to court without a subpoena? A. No, sir.

Q. In other words, he gave you the subpoena Saturday to make sure you would be here. Is that right? A. Yes, sir.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Direct.

Q. And that you would testify. A. Yes, sir.

Mr. Gordon: That's all.

Mr. Wille: That's all, Mr. Wayda.

(48) Mr. Gordon: While the witness is here, may I have the rule book marked for identification, please?

(The rule book referred to is marked Exhibit P-6 for identification.)

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(49) Newark, New Jersey,
March 3, 1954.

Transcript of Testimony of Witness Fred Ulbrich.

Before:

HONORABLE A. J. CAFIERO, *J. S. C.*, and a jury.

(Appearances as before.)

(50) FRED ULBRICH, sworn.

Direct examination by Mr. Gordon:

Q. Mr. Ulbrich, on February 2, 1952, you were the stationmaster at the garage of the Public Service terminal at 19th Street and 16th Avenue? A. That is 20th Street and 16th Avenue.

Q. At 20th Street and 16th Avenue? A. That's right.

Q. Is that garage one that runs through from 19th Street to 20th Street, or as we have been referring to it as 19th Street and 16th Avenue?

Mr. Wille: I think we have been calling it the 16th Avenue garage.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Direct.

Mr. Gordon: I just want to clear up one little thing.

A. It doesn't run through the block.

Q. It is at 20th Street and 16th Avenue. Is that right? A. That's right.

Q. You were the stationmaster there at that time? A. I was.

Mr. Wille: Speak up, please. Speak up so that No. 12 juror and counsel can hear you.

Q. You were the stationmaster? A. I was.

Q. As such, were you Harry Kream's boss? A. I was, yes.

(51) Q. Did Harry Kream call you on the morning of February 2, 1952, some time between 11 and 11:30 a. m. and tell you that he was ill? A. He did.

Q. He did call you? A. Yes, he had called.

Q. He told you he was ill? A. Yes.

Q. Did he tell you what was wrong with him? A. He said he had been sweating and he had the chills.

Q. Did you send a man to relieve the decedent, Harry Kream, at 14th Avenue and 16th Street? A. 14th Avenue and 19th Street.

Q. 14th Avenue and 19th Street? A. I did.

Q. And that man was Edward Wayda? A. It was.

Q. Did you tell Edward Wayda that the man was ill, the decedent was ill? A. I told him he was sick, yes.

Q. Mr. Ulbrich, did you send anybody who could give him medical attention when he brought the bus up to 19th Street and 14th Avenue? A. No.

Q. You did not? A. No, I did not.

Q. When did you see Kream next? A. After he was ill?

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Cross.

Q. After this phone call. A. I hadn't seen him at all. I didn't see him at all.

Q. Did you, Mr. Ulbrich, send anybody to take the man home from 19th Street and 14th Avenue? (52) A. I did not.

Mr. Gordon: That's all. Cross examine.

Cross examination by Mr. Wille:

Q. Mr. Ulbrich, did Mr. Kream, when he called you, tell you where he was? A. At Military Park.

Q. Did he tell you where he wanted relief?

Mr. Gordon: I object to that, if your Honor please. That is improper cross examination. I didn't go into the feature of it on direct. I put the witness on for one specific purpose, to bring out what was brought out in counsel's opening, and I did it purposely. This may be proven by way of defense, when he calls him as his witness. I want to be in a position where I can cross examine him. It is improper cross examination.

The Court: I am going to deny the objection. You may continue.

Mr. Gordon: Will your Honor note my objection.

Q. Did Mr. Kream tell you where he wanted to be relieved? A. He did.

Q. What did he tell you? A. At 19th Street and 14th Avenue.

Q. Did he ask you at that time to send any medical assistance? A. He did not.

Mr. Gordon: I object to that.

(53) The Court: Denied.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-direct.

Q. Did he ask you to send anyone to take care of him in his car at that time? A. He did not.

Mr. Wille: That's all.

Re-direct examination by Mr. Gordon:

Q. Did you feel that as a sick man he should have driven that bus having chills and fever on February 2, 1952 from Military Park? A. Yes.

Q. A 16-minute run up to 19th Street and 14th Avenue?

The Court: Do you have an objection?

Mr. Wille: The witness started to answer the question before he was finished. I will ask the stenographer to please repeat the question.

The Court: Of course, Mr. Ulbrich, you recognize that there are two sides to this case. Counsel has propounded a question that may prove objectionable to the attorney. Don't answer it too quickly so that he may have a chance to register his objection if he wishes to.

Mr. Gordon: I will withdraw it.

The Court: Reframe the question.

Mr. Gordon: It was answered before it was completed.

The Court: It will be deemed withdrawn and (54) stricken.

Q. Mr. Ulbrich, you have the authority, do you not, and you had it on February 2, 1952 as Harry Kream's boss to forbid him to drive the bus from Military Park to 19th Street and 14th Avenue, isn't that correct? A. No; I wouldn't say forbid him to drive.

By the Court:

Q. The question is did you have the authority to forbid him from driving that bus? A. No.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-direct.

By Mr. Gordon:

Q. You did not? A. No.

Q. Who had that authority? A. I think it is up to himself. He ought to know that.

Q. You are the man's boss, isn't that right? A. That's right.

Q. You can take a man off the bus as the operator of it when he says he is sick, can't you? A. If he is too sick to drive.

Q. You can tell him to get off? A. If he doesn't want to drive the bus, that's up to him.

Q. Is he the sole judge of it or are you the man who can tell him? A. He is the sole judge of himself driving that bus.

Q. When he told you he was sick he also told you he wanted relief. Is that right? A. At 19th Street (55) and 14th Avenue.

Q. Did you feel he was sick enough from what he told you to be relieved at 19th Street and 14th Avenue?

Mr. Wille: I object to the question. The witness didn't see Mr. Kream. This is a telephone conversation.

A. Was he sick enough to be relieved? Is that the question?

Q. Yes, at 19th Street and 14th Avenue. A. He asked to be relieved.

Mr. Wille: I object.

The Court: Suppose we get a new question.

Q. From the telephone conversation which he had with you from Military Park in which he told you he had chills and fever, and asked to be relieved at 19th Street and 14th

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-direct.

Avenue as you say from the further operating of the bus, did you feel that he was sick enough to be relieved at 19th Street and 14th Avenue? A. I couldn't answer that.

The Court: Isn't that obvious?

A. (Continuing) I couldn't answer the question.

Q. Having sent someone, you were satisfied he was sick enough to be relieved. Is that right? A. Yes.

Q. When you sent a man to relieve him at 19th (56) Street and 14th Avenue, did you interest yourself in seeing that this man whom you were satisfied was sick enough from being relieved from driving the bus at that point, did you interest yourself in seeing that he had some medical attention at that point?

Mr. Wille: If the Court please, I object to the question. The question is argumentative. Further, this is his own witness. This is not cross examination. It is not a proper subject of redirect examination in the way it is framed. I object.

The Court: Of course, I see nothing particularly harmful in the question. Suppose you restate it. Try not to ask three or four questions in one statement. Make them where it requires one answer. It will be much easier.

Q. Feeling as you did from that telephone conversation that this decedent, Harry Kream, was sick enough to be relieved at 19th Street and 14th Avenue, did you interest yourself in any way to give this sick man at 19th Street and 14th Avenue some medical attention? A. No.

Q. You were how many blocks away from 19th Street and 14th Avenue in your place where you performed your duties as stationmaster? A. That's about (57) three blocks; a little over three blocks.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-direct.

Q. About how many minutes walk would you say on an average? A. Average about five minutes; about four to five minutes.

Q. Feeling satisfied from this telephone conversation, as you said you were, that Kream was sick—sick enough to be relieved—did you make any attempt yourself to go over either on foot or by transportation to 19th Street and 14th Avenue to meet this man, this sick man, when he arrived there to see what you could do for him? A. No, I did not.

Q. You have been employed by the Public Service for how long up to the time of Kream's death? A. 32 years.

Q. Of those 32 years, Mr. Ulbrich, would you please tell us how long you have been stationmaster at 20th Street and 16th Avenue. A. I believe it is about 15 or 16 years.

Q. Was Harry Kream working under you all that time? A. He was.

Q. You were his boss all that time? A. I was.

Q. Did you find him a good loyal worker? A. Very good; good.

Q. Did you find him a man who did what was asked (58) of him by you? A. Positively, absolutely.

Q. Did you believe him when he told you he was sick? A. I did.

Q. As a matter of fact, Mr. Ulbrich, you went to the funeral parlor at the time of the funeral, did you not? A. I did.

Mr. Wille: If the Court please, I think it is immaterial.

The Court: What is the purpose of this?

Mr. Gordon: It is leading up to a point where I am about to ask the witness about a conversation which he had.

The Court: Ask it.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-direct.

Mr. Gordon: But I have to give the locale of where the conversation was had. It is a preliminary question.

The Court: All right, you may proceed.

Mr. Gordon: Sometimes some of us take a more circuitous route to get to the point. I have that failing.

Q. At the funeral parlor did you have a conversation with Mrs. Kream and two daughters of the decedent? A. Mrs. Kream; I don't remember the two daughters.

Q. Not her two daughters; the two daughters of Harry. Didn't you talk to Mrs. Kream and the two daughters (59) of Harry Kream? A. I don't remember.

Q. Would you say you had not spoken to them at the funeral? A. I don't remember. I don't recall talking to them. I talked to Mrs. Kream.

Q. You don't recall whether you talked to the other two? A. I may have sympathized with them. Is that what you mean?

Q. Were they present, the two girls, when you talked to Mrs. Kream? A. I don't remember.

Q. Now, didn't you tell Mrs. Kream at the funeral parlor——

Mr. Wille: I don't like to interrupt counsel before he starts bringing out matters that are prejudicial, but it is my right to object.

The Court: I am going to sustain the objection. I don't know what the purpose of this line of testimony is. It is your witness. I don't know what you are seeking to do with this line of examination.

Mr. Wille: May I say this? When I had something that I doubted, we had a side bar conference. I think we should discuss it at side bar.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-direct.

Mr. Gordon: I don't think we should. I prefer to do it this way. Your Honor is the power who decides here and I think you should permit me to (60) state what I have to say.

The Court: What is it?

Mr. Gordon: I seek to bring out from this witness a conversation that he had with Mrs. Kream at the funeral parlor in which he expressed his regret.—

The Court: You want to bring out from this witness a conversation he had with Mrs. Kream?

Mr. Gordon: Yes. He has not denied it. He said he talked with Mrs. Kream. I want to bring out the substance of that conversation. Let him do that.

The Court: This is your case. How could Mrs. Kream come in now and tell us what she said. Wouldn't it be self-serving?

Mr. Gordon: It is what he said to Mrs. Kream, he as the boss, as the decedent's superior, what he said with regard to the conversation.

The Court: You can have Mrs. Kream testify to it. Ask her what she said.

Mr. Gordon: You will permit it? You will permit it then?

The Court: I will rule on that when that time comes.

Mr. Gordon: As I understand the rules of evidence, (61) I cannot ask Mrs. Kream until I have first asked him and laid the foundation for her testimony to be admitted.

The Court: I respectfully disagree with you on the law of the case. Mrs. Kream is a party to this proceeding. There need not be any foundation laid insofar as Mrs. Kream is concerned. She certainly

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-cross.

can testify. After her testimony is in then it is up to the defendant, if it wants to, to challenge the statement she makes. I do not think you can bring it out from this witness until you have your testimony. That is my understanding of the law and you may have your objection noted.

Mr. Gordon: Thank you. I will not pursue the question, and if you give me the benefit of the objection, I will ask Mrs. Kream when she goes on as to what he told her at the funeral parlor.

That's all.

Re-cross examination by Mr. Wille:

Q. Mr. Ulbrich, you didn't see, as I understand it, Mr. Kream at all, did you? You just had a phone call. Is that right? A. That's right.

Q. Upon what he told you concerning his health, you relieved him at 19th Street and 14th Avenue? A. Yes, sir.

(62) Q. Only because of what he told you. You knew nothing of his condition personally. Is that right? A. That's right.

Q. When he called you from Military Park, he requested relief at 19th Street and 14th Avenue. Is that correct? A. He did.

By the Court:

Q. Mr. Ulbrich, does the company maintain any telephones at 14th Street, or wherever he made this call? It would be necessary to alight from the bus? A. There is no phone there.

Q. Can you identify for us, if you know yourself, just where this telephone call came from? A. From Military Park, that's the end of the line. Saybrook Place; we call it Military Park on the schedule. Saybrook Place is the end of the line.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-cross.

Q. Are you telling me now of the bus terminal at the Military Park Building? A. Yes.

Q. And that is the place that he told you he was calling from? A. He was calling from the end of the line, which I presume is Military Park, the end of the line.

Q. Of course, I assume at that time he had no passengers in the bus, did he? A. I couldn't tell you.

(63) Q. You don't know? A. I don't know.

Q. Was it up to him to determine whether or not he should proceed from that point to go to 19th Street, or did he go at your direction? A. He went on his own direction. He went up there himself. I didn't tell him. He wanted to get relief at 19th Street and 14th Avenue.

Q. Was 19th Street and 14th Avenue on the route that he would normally pursue had he been in good health? A. Yes.

Q. Was it on the route he was driving that particular day? A. That's right.

Q. Of course he would continue beyond 14th Street if he had been in normal health. Is that right? A. That's right.

Q. It is your testimony that he chose to terminate his travel at that point? A. That is a relief point where all reliefs are made by all operators.

Q. The route he drove that day started at what location? Where did he start that day? A. He started at 19th Street and 14th Avenue going east.

Q. Going east? A. Yes.

Q. Approximately what time would he have started that morning? A. At 9:58.

Q. Two minutes before ten o'clock in the morning? (64) A. That's right.

Q. You didn't hear from him until approximately what time? A. 11:35.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-cross.

Q. Did you make a record of his call to you? A. We have a record, yes.

The Court: That's all.

By Mr. Gordon:

Q. Mr. Ulbrich, Military Park is a terminus of the bus on the east side of the park or on the west side of the park. In other words, is it on Park Place or is it on Broad Street? A. Military Park is Park Place and Broad Street.

Q. Yes, but the terminus of the bus, where is that? A. That must be on Park Place.

Q. Park Place? A. Park Place, yes.

Q. How close to the Public Service Terminal and offices is that area? A. Well, I would say about a block and a half down, about a half block.

Q. Did you tell him to go over to the Public Service Terminal and avail himself of any medical services because he told you he was sick and you believed it? A. He didn't ask for it.

Q. He told you he was sick and you believed him. Is that correct? A. That's right.

The Court: Don't argue with the witness.

(65) Mr. Gordon: It may be my tone.

The Court: It is not your tone; it is the question. Your tone is perfectly all right. He said he didn't ask for it.

Q. Did you suggest it to him?

The Court: He has answered that.

A. I didn't.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-cross.

Q. Did you suggest to him that he get a driver to relieve him at the terminal of the Public Service just a block away from where his bus was? A. No. I don't understand the question. Where can he get a driver? He is supposed to call me for the driver.

Q. There are drivers at the main terminal of the Public Service, relief men, aren't there? A. No, sir.

Q. Well, there are other buses that could have been sent out, could there not, to take the place of this bus at Military Park?

The Court: He has answered that. There is no necessity for prolonging it.

Q. If he wanted relief at 19th Street and 14th Avenue, he could have driven that bus directly to the garage where you were, could he not, without making this telephone call?

Mr. Wille: If the Court please, I submit that is argumentative in its present form. This (66) is his own witness.

The Court: I think it is argumentative. What this decedent could have done of course is something that is conjectural and argumentative.

Q. Did you tell him when he called you that you didn't want him to drive the bus up to 19th Street and 14th Avenue from Military Park if he was sick? A. No.

Q. You did not? A. No.

Q. Did you feel that this man whom you believed to be sick was a fit person to drive the bus with passengers that he would pick up en route for hire from Military Park to 19th Street and 14th Avenue?

Mr. Wille: I object to the question, if the Court please.

The Court: I will sustain the objection.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-cross.

Q. Mr. Ulbrich, did you say to Harry Kream or tell him when he telephoned you and told you he was sick and you believed him, "Don't drive the bus to 19th Street and 14th Avenue if you are sick"? A. He wanted to drive the bus. I didn't tell him anything.

Q. Did you tell him not to drive the bus, not what he wanted? A. No, I didn't tell him.

Q. Mr. Ulbrich, do you remember being interviewed by Mr. Babitz, who sits to my left here, who is holding (67) his hand up? A. Yes.

Q. Do you remember being interviewed by him on March 15, 1952? A. Yes.

Q. Where were you interviewed by him?

Mr. Wille: I object to any further questions on this.

The Court: I am going to sustain the objection. This witness has not demonstrated any hostility. He has responded to everything that counsel has asked and that I have asked.

Mr. Gordon: He has responded, but the response he has given is different from the response that I have here and that I expected, so I have to again plead surprise.

The Court: For the first time now on the second re-direct? You had him on direct and turned the questioning over to cross examination. You didn't raise the point then. Both counsel concluded and I asked questions and there wasn't any claim of surprise. You come along on the second re-direct and plead surprise.

Mr. Gordon: I didn't ask him that question on direct which I asked him just now. I had avoided asking that. I didn't want to be in a position of

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-cross.

pleading surprise because I realize that in pleading (68) surprise we effect a neutralization. I didn't want to neutralize until I had something to try and neutralize.

Now I have him on second re-direct. This question was asked and he answered. I plead surprise and ask leave to go into the question of impeaching his testimony on this point because I have here a statement which he made to Mr. Babitz which is contrary to the testimony on this point.

The Court: You are going to take the position now of disbelieving all of this witness's testimony?

Mr. Gordon: We only want the features of it that are contrary to this question.

The Court: I am going to permit you to direct your questions to the one single statement. I am going to let you do that.

Mr. Gordon: May I ask your Honor what question has been asked and what answer given?

The Court: His question was did he want to drive the bus and he said I didn't tell him to drive it.

Mr. Gordon: The question was that he said the man wanted to drive it up to 19th Street and 14th Avenue where he wanted relief, that he didn't want it down at Military Park.

The Court: All right.

(69) By Mr. Gordon:

Q. You were interviewed by Mr. Babitz, were you not, on March 15, 1952? A. Yes.

Q. And that interview took place in Mr. Babitz's automobile across the street from the station or the garage of the Public Service at 20th Street and 16th Avenue. Is that right? A. That's right.

Exhibit P-3.

Fred Ulbrich, for Plaintiff—Re-cross.

Q. How had you gotten to that car to be interviewed by Babitz?

The Court: Why don't you ask him whether he said that statement.

By the Court:

Q. Do you remember making a statement to Mr. Babitz? A. I did; I made a statement.

The Court: Listen to this statement. Do you want him to read it?

Mr. Gordon: Then we go into everything.

The Court: I want you to come right to the point and ask him whether or not he made that particular statement.

By Mr. Gordon:

Q. Did you say to Mr. Babitz, "He"—Harry Kream—"telephoned from Military Park, he said, 'Have you got anybody to relieve me? I have chills and I am sweating and I want to be relieved,' and I told him that he (70) could get relief at 19th Street and 14th Avenue about a mile and a half from where he was calling from"?

By the Court:

Q. Did you make that statement? A. Read it over again.

The Court: Do you want the stenographer to read it?

Mr. Gordon: Maybe I should hear it. Well, I have the exact statement here.

The Court: All right.

Exhibit P-4.

By Mr. Gordon:

Q. Did you say to Mr. Babitz, "On February 2, 1952, at about 11:35"——

The Court: That's not the statement you previously read to him.

Mr. Gordon: I have just added the date.

The Court: Don't add anything.

Mr. Gordon: Will the stenographer read it?

(The court stenographer reads a previous question as follows: "Did you say to Mr. Babitz, "He"—Harry Kream—"telephoned from Military Park, he said, 'Have you got anybody to relieve me? I have chills and I am sweating and I want to get relieved,' and I told him that he could get relief at 19th Street and 14th Avenue about a mile and a half from where (71) he was calling from?")

A. Yes.

Q. You did tell him that? A. Yes.

Mr. Gordon: That's all.

The Court: Is there anything further, Mr. Wille?

Mr. Wille: No.

Exhibit P-4.

Death Certificate as Amended.

(See Opposite ☞)

Note

Page 307a (Exhibit P-4) is on Card 5.

Exhibit R-1.

Summons.

Issued December 29, 1952.

Complaint.

ESSEX COUNTY COURT.

LAW DIVISION.

HENRIETTA KREAM, Administratrix *ad Prosequendum* of the Estate of HARRY KREAM, deceased,

Plaintiff,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT, a corporation of the State of New Jersey,

Defendant.

Civil Action.

Complaint.

The above named plaintiff, residing in the City of Newark, County of Essex, and State of New Jersey, says that:

1. She is the administratrix ad prosequendum of Harry Kream, deceased, having been appointed as such by the Surrogate of the County of Essex on the 13th day of November, 1952.

2. On or about February 2, 1952, and at all times hereinmentioned, the defendant was and is a corporation of the State of New Jersey, with its principal office located in the Public Service Terminal Building, 80 Park Place, Newark, New Jersey.

Exhibit R-1.

3. At the time and place aforesaid, the defendant corporation was engaged as a common carrier for hire, by bus and motor vehicles, of passengers.

4. At or about February 2nd, 1952, and for some time prior thereto, the plaintiff's intestate, Harry Kream, was employed by the defendant corporation as a driver and operator of its buses and other motor vehicles used in the transportation of passengers in and about the City of Newark, and adjacent communities.

5. On February 2, 1952, plaintiff's intestate, Harry Kream, while engaged in his duties as an operator and driver of a bus owned by the defendant corporation and while he was in the employ of the defendant corporation, became very ill and sustained an acute heart attack, necessitating immediate attention, first aid and medical care. The stricken condition of plaintiff's intestate was made known to the defendant corporation through its agents, servants and employees. In complete and wanton disregard of the health and safety of the plaintiff's intestate, the defendant corporation failed to furnish him with proper care and medical treatment and directed him in such sick condition, to drive and operate his bus for a considerable distance, and while he was suffering from his said illness, and then allowed him to drive his car toward his home, alone and unattended, and in such sick and ill condition, abandoned him to his own resources and by virtue thereof accelerated and exascerbated his condition and precipitated his death while he was in his said automobile.

6. The defendant corporation, through its agents, servants, and employees, wrongfully and negligently failed to discharge the duty it owed to the plaintiff's intestate which arose out of the strict necessity and urgent exigency due to the said plaintiff's intestate's sudden illness.

Exhibit R-2.

WHEREFORE, plaintiff demands as damages from the defendant corporation the sum of One Hundred Fifty Thousand ($150,000) dollars, together with costs of suit.

Signed: MILTON ALBERT,
Attorney for Plaintiff.

Exhibit R-2.

Answer.

The defendant, Public Service Coordinated Transport, a corporation of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey, in answer to the plaintiff's complaint, says that:

1. It has no knowledge sufficient to form a belief as to the truth of the allegations of paragraph 1 of the Complaint.

2. It admits the allegations of paragraphs 2 and 3 of the Complaint.

3. In answer to paragraph 4 of the Complaint it admits that for some time prior to February 2, 1952 and during a part of February 2, 1952, the plaintiff's intestate was employed by the defendant as a bus operator. It denies the remaining allegations of paragraph 4 of the Complaint and denies that, at the time of the events complained of in the Complaint, the plaintiff's intestate was acting in any capacity as its employee.

4. It denies the allegations of paragraphs 5 and 6 of the Complaint.

Exhibit R-2.

FIRST DEFENSE.

It avers that the matters complained of in the Complaint were caused by the sole negligence of the plaintiff's intestate.

SECOND DEFENSE.

It avers that the matters complained of in the Complaint were caused by the contributory negligence of the plaintiff's intestate.

THIRD DEFENSE.

It avers that the plaintiff's intestate, by his own conduct, assumed all risk of the events complained of in the Complaint.

FOURTH DEFENSE.

It avers that the events complained of in the Complaint were unavoidable so far as the defendant is concerned.

FIFTH DEFENSE.

It avers that the plaintiff, Henrietta Kream, on or about May 16, 1952 filed in the Workmen's Compensation Division of the New Jersey Department of Labor and Industry a suit for workmen's compensation, which suit is still open and not disposed of and which involves the same subject matter as the Complaint in this Court. The plaintiff having first elected to pursue that remedy in the Workmen's Compensation Division of the New Jersey Department of Labor and Industry, has barred herself in this Court.

SIXTH DEFENSE.

It avers that the Complaint fails to state a claim upon which relief can be granted.

LUKE A. KIERNAN, JR.,
Attorney for Defendant.

Exhibit R-3.

Pretrial Order.

The parties to this action or their attorneys having appeared before the Court at a pretrial conference, the following action was taken:

This action is brought by Henrietta Kream, the widow of dec'd. as Administratrix ad prosequendum, she having been duly appointed to act as such Administratrix ad Prosequendum by the Surrogate of the Co. of Essex on the 13th day of November, 1952. Plf. alleges that on Feb., 2, 1952, her intestate was a driver and operator of a bus owned by deft. corp., and in which the deft. transported for hire passengers in and about City of Newark. On February 2, 1952, while plf's intestate, Harry Kream, was engaged in his duties as the operator and driver of said bus, he became very ill, necessitating immediate medical attention and other emergency medical care, which illness was made known to the deft. corp. through its agents, servants, and employees. The deft. was negligent in that it failed to furnish plf's intestate with proper care and medical treatment after having knowledge of his stricken and helpless condition, and directed plf's intestate in such condition to drive and operate a bus for a considerable distance, at the end of which it relieved the said plf's intestate of his driving and operating the bus, but it was further negligent, in that, through its agents, servants and employees, it left plf's intestate alone and unattended at the place where it relieved him as a bus driver, abandoning him to his own resources and permitting him to drive an automobile by himself toward his home in such stricken and helpless condition. As a result of said negligence of the deft., plf's intestate died the same day.

Said deft. corp. through its agents, servants, and employees wrongfully and negligently failed to discharge the duty it owed to the plf's intestate, which arose out of the strict necessity of urgent exigency due to plf's intestate

Exhibit R-3.

sudden illness, and was also negligent in failing to furnish him with medical and other emergency first aid care.

Plf cites as authority for its action Szabo vs. Penn. R. R. Co., 132 NJL 331, and Burns v. Bakelite Corp. 17 N. J. Super. 441; also Basch v. Penn. R. R. Co. a decision of Appellate Div. of Super. Ct. of N. J.

Plf contends the issues to be determined at trial are negligence of deft., the causal relationship between said negligence and death of plf's intestate, and damages to be awarded.

Deft. admits plf's decedent was employed by deft for some time prior to 2/2/52, and that on 2/2/52 he was engaged for a part of that day in operation of a bus for deft.

Deft. contends death of plf's decedent and his illness immediately prior thereto had no relation to decedent's employment by this deft., and in addition thereto was completely unrelated to any act of omission on part of this deft. Deft. will rely on special defenses set up in ans., being, first, sole negligence of plf's intestate; second, contrib. neg. of plf's intestate; third, assumption of risk; fourth, unavoidable as far as deft. is concerned; and, fifth, election of remedies by reason of institu- of Workmen's Comp. action; and sixth, that complaint fails to state cause of action.

Attorneys will be required to furnish a trial brief within 5 days of trial, which will also be served on opposing counsel.

Weekly call Sept. 11.

MILTON ALBERT,
Attorney for Plaintiff.

LUKE A. KIERNAN, JR.,
Attorney for Defendant.

WILLIAM A. SMITH,
A. J. S. C.

Filed: June 17, 1953.
RUSSELL C. GATES, Clerk.

Exhibit R-4.

Judgment.

This action was tried before Judge A. J. Cafiero with a jury at the Essex County Court on March 5, 1954.

Before the jury was called, the Court, after further argument by both counsel on the motion for judgment for defendant, granted and ordered judgment entered in favor of the defendant and against the plaintiff.

Whereupon it is adjudged that judgment be entered in favor of the defendant Public Service Coordinated Transport, a corporation of the State of New Jersey and against the plaintiff Henrietta Kream, administratrix of the Estate of Harry Kream, deceased, in the sum of Sixty-four dollars and twenty-five cents, ($64.25) Costs of Suit.

Judgment Signed and Entered March 5, 1954.

Russell C. Gates.

Exhibit R-5.

Excerpts from Argument in Civil Action.

ESSEX COUNTY COURT.

LAW DIVISION.

Docket No. 95567.

Newark, New Jersey,
March 4, 1954.

* * * * * *

(2) Mr. Gordon: Now, your Honor, we come to the fourth ground that if she has any right to recovery, her right of action is in the Compensation Courts.

The Court: It would seem to appear from my quick reading of the Estelle *vs.* The Board of Education case that unless an employee avails himself of Section 2 of the Workmen's Compensation Act that he is bound to pursue his remedy in the Workmen's Compensation Division.

Mr. Gordon: There is no question about that if there was an accident arising out of and in the course of his employment with the respondent.

The Court: When did this occur?

Mr. Gordon: The medical proof shows that the failure to furnish him with immediate medical attention down there, with his chills and sweating, that alone played a part in his death.

The Court: Did that arise out of the course of his employment?

Mr. Gordon: The case your Honor is talking about was an occupation disease that arose by virtue of the employment. There is absolutely no evidence to show that this man's heart attack arose by virtue (3) of any employment, but the evidence is to the contrary. The gravamen of this action, if your Honor please, is that a man became

Exhibit R-5.

stricken while at work, not due to the work. He had this condition in him for years. He became stricken while at work and at that time the duty devolved upon the employer to furnish him with medical care and attention. They failed in that duty and therefore were negligent.

The Court: Why was a petition or complaint filed in the New Jersey Department of Labor and Industry?

Mr. Gordon: The petition was filed there as a precautionary measure only, number one; and, number two, under the Goetaski *v.* California Packing Corp. case—that is Judge Woods' case—even where benefits were taken in the absence of an adjudication that compensation is payable.

The point is here that just because a petition for Workmen's Compensation is filed that doesn't mean that department has jurisdiction. If, as a result of that fourth ground —which is merely an afterthought on Mr. Wille's part who is grasping for straws here—your Honor were to dismiss this (4) action, we are confronted with a compensation case in which we could not collect because there is no accident arising out of and in the course of the employment.

That is a precautionary measure; most lawyers will do that. They will file a claim petition for Workmen's Compensation and they will file a common law suit where a common law suit is applicable as in this case. With the result that if the common law suit goes to trial and there is a recovery, that ends it. If the compensation trial goes to trial first and there is a recovery, that ends it.

The Court: Does counsel claim that the distinguishing mark is the adjudication by a tribunal? Must there be an adjudication?

Mr. Gordon: That's what Judge Woods said in the Goetaski case. I have it here.

The Court: Regardless of that, no such distinction was made in the Estelle *vs.* Board of Education case.

Exhibit R-5.

Mr. Gordon: There he is dealing with a situation where there was a compensable occupational disease and they tried to bring it at common law, but it was held to be a compensable occupational disease. (5) which had arisen after the amendment to the Compensation Act which made all occupational diseases compensable. That act was passed by the legislature, as I remember it, in 1950. So that I don't think that we want to permit ourselves to be misled by that decision. Under the 1950 act everything became occupational; so that you could no longer go in at common law and sue for any condition that occurred subsequent to 1950. Now you go into compensation. That is all that case holds.

The distinguishing feature between that type of case that you have there and the case you have here is that here we have a condition which is not due to an occupational disease or to an accident arising out of and in the course of the employment where the man became sick.

The Court: Are there not claims where compensation has been allowed on a coronary condition in Workmen's Compensation Court?

Mr. Gordon: Where you show unusual exertion or by virtue of the employment.

The Court: The mere fact that one suffers a coronary thrombosis does not preclude him from going to Workmen's Compensation, does it?

(6) Mr. Gordon: I don't dispute that with you. All I can say to you is as the state of the law is now, by no stretch of the imagination—and I make this statement solemnly—could this be considered as arising out of and in the course of the employment with the Public Service, and if my adversary feels that it is, let him now say so.

The Court: Does counsel claim from that statement that where an injury or a loss sustained is not compensable in Workmen's Compensation, he then can come into a court of law for relief?

Exhibit R-5.

Mr. Gordon: No, sir.

The Court: What is your statement?

Mr. Gordon: That unless a heart condition is brought about by virtue of the employment, then you cannot consider it as a compensable injury. Now, in this case it started down there at Military Park. At that time there arose a duty in the employer to furnish medical care. That was not furnished, and instead the man was allowed to go along with his heart condition.

I say that this is purely and simply a common law action. They even recognize it as such. There is no defense in there which says that this is not (7) a common law action. They merely raised the defense in their answer and in their contention in the pretrial order that in filing a claim petition for Workmen's Compensation that we made an election of remedies.

The Court: From what counsel has stated to me that there is no right of recovery under the facts as you understand them in the Workmen's Compensation, why did you not dismiss and not have any action pending there and come before us with the statement that there is one action pending? As it appears now, you have elected by permitting your Workmen's Compensation petition to remain, in all probability awaiting the outcome of this proceeding. Are you entitled to invoke two processes for this cause of action; one in this court and one in the Workmen's Compensation Court?

Mr. Gordon: No, we are not doing that. They say we have made an election of remedies by reason of the institution of the Workmen's Compensation action. The Estelle case does not deal with the question of election of remedies.

Here is what the Goetaski case says. In an opinion by Judge Woods, he said: "The doctrine of election of remedies is predicated upon existence of (8) co-existing and inconsistent remedies, and therefore not every election of

Exhibit R-5.

remedies is irrevocable, in view of fact that two or more remedies are often given to redress the same wrong and are concurrent remedies.

"The right of injured 17-year-old workman to claim damages and his right to claim workmen's compensation were not inconsistent but were alternative and concurrent remedies.

"Acceptance of workmen's compensation payments and medical benefits by injured 17-year-old workman and filing of claim petition with Workmen's Compensation Bureau did not estop such workman from proceeding in law, especially in view of fact that there had been no adjudication in favor of minor under Workmen's Compensation Act."

After all, if your Honor please, where could there possibly have been an election of remedies in this case? I might say that the Goetaski case cites some of the leading cases on the election of remedies.

The Court: What were the facts in the Goetaski case?

(Mr. Gordon reads Goetaski case.)

The Court: I would like to hear from Mr. Wille. I think you are entitled to a little rest. Let me (9) hear you on that. How does our situation differ from that? How is the Estelle case controlling in this situation? Estelle case merely holds that unless one should elect to avail himself of Section 2 by writing, that he is controlled by Section 1 of the Act.

Mr. Wille: That's right. It merely deals with the right of this Court to hear it.

The Court: You are now posing that for the first time and this is not included in your pleadings. You now, at the end of the case, question the jurisdiction of this Court to hear this matter.

Mr. Wille: Because of the proofs as submitted.

The Court: You claim that at any time anyone sustains

Exhibit R-5.

any type of an injury that his only remedy is in the Workmen's Compensation Court; that there is no longer any common law right to invoke the processes and jurisdiction of this court.

Mr. Wille: If it is an injury arising out of the course of employment and the testimony was that it was an aggravation.

The Court: I just wanted to get your thought on that. Let me hear you on the election of remedies as has been explained. How does our situation differ (10) from that?

Mr. Wille: I think there is a big distinction. In that case, as I recall it, the plaintiff was an infant. There was some question as to whether the infant plaintiff came under the section.

The Court: As a matter of fact he had received benefits and he was in a better position.

Mr. Wille: He had to dismiss his case prior to the law suit.

The Court: It was not the dismissal that mattered, it was the adjudication.

Mr. Wille: I cannot argue against the holding of the court. I contend that the case being opened and the failure to dismiss, is an election, but I am more concerned with the jurisdictional question rather than the election of remedies.

The Court: On the broad policy that the plaintiff can no longer invoke the jurisdiction of this court. To that extent I am going to deny your motion on that particular point. The others I have ruled upon at the close of your previous motion.

* * * * * *

Exhibit R-6.

Oral Decision by Judge Cafiero Granting Motion for Judgment in Favor of Defendant in Civil Action.

Newark, New Jersey,
March 5, 1954.

The Court: This morning I indicated to chief counsel for the plaintiff that I was disposed to grant defendant's motion, and I urged him to extend himself to convince me to reach a different result. I regret to state that I cannot do so.

A careful reading of my notes and of the laws which seem to me to apply, I am led to this conclusion, and, that is:

(1) That my previous ruling of the defendant's motions in this matter are to be disregarded.

(2) The testimony is that plaintiff's intestate, a bus operator, after he had worked a few hours, feeling ill, stopped his bus at the terminal on Park Place, Newark, and telephoned his immediate superior in another part of the city, informing him that he had chills and was sweating and requested to be relieved from further duty. His car was parked at a place about a mile and a half distant from where he had made the telephone call. He was met at the place where his car was parked by a relief driver, who stated that decedent looked sick and he told decedent to call up the company and have someone drive his car home; but that the decedent replied that (3) he didn't want to be bothered getting in touch with anyone. Whereupon decedent entered his own car and proceeded to drive toward his home, and after traveling a few blocks his automobile was seen to climb the sidewalk and come to rest alongside of a brick retaining wall and some hedges. Some-

one immediately sought to come to his aid, but before he could be removed from his automobile he died. It is undisputed that his death was due to a coronary occlusion.

Decedent's superior, Mr. Ulbrich, was called as a witness by the plaintiff and stated that when decedent telephoned him, decedent requested that he be relieved at the specified place where his automobile was parked. Thereafter, upon redirect examination of this witness by the plaintiff who had called him, this witness was asked whether he told plaintiff's investigator that when decedent said, "Have you anybody to relieve me; I have chills and I am sweating and I want relief, and I told him he could get relief at 19th Street and 14th Avenue, about a mile and a half away," to which the witness replied, "Yes;" and no further questions were asked of this witness. The location at 19th Street and (4) 14th Avenue was where decedent's car was parked.

Plaintiff contends that this contradictory statement is evidence of the occurrence of the fact which it states and cites Fox *v.* 44 Cigar Co., 90 N. J. L. 483 in support of such principle. It was first claimed that with such fact the case comes within the principles enunciated in the cases of Szabo *v.* Pennsylvania Railroad, 133 N. J. L. 331 and Bascho *v.* Pennsylvania Railroad, 3 N. J. Super. 86 but it is my opinion that the reply to counsel's latter question cannot be admitted as affirmative proof of the facts stated in the question, and that our case can be distinguished from the Fox case. Here the best interpretation that can be placed upon the affirmative reply is that he made that statement to the investigator. It does not follow that it is evidence that such fact actually took place, and it cannot be given such interpretation in view of this witness' previous positive answer to the contrary. In the Fox case the letter admitted was proof of the facts stated. The best that can be said of the later answer by this witness in our case is

Exhibit R-6.

that it contradicted the previous answer. It is contradictory and neutralizes the previous (5) direct answer. It is not affirmative proof in the cause.

It is now argued that the mere failure to give medical assistance at Military Park is negligence sufficient to submit the case to the jury. I think not. The common understanding of chills and sweating would not indicate an emergency to a reasonably prudent person, but more likely a virus infection or grippe condition, particularly happening as it did at this time of the year. In applying the best interpretation which can be placed upon the facts in evidence it would not appear that reasonable men could conclude that an emergency existed requiring the master to do other than what was done, namely, to provide relief so that the employee could go to his home and to furnish such relief for him at the place where his car was parked; and at that point there is nothing in evidence which increased the defendant's duty, but on the contrary the testimony is that the decedent refused to heed the suggestion made to him by the bus operator who was sent to relieve him that he call the company and have someone drive his car home.

The facts are unlike the Szabo case and the (6) Bascho case, but more nearly conform to the case of Burns v. Bakelite Corp., 17 N. J. Super. 441, where the employer through its agent and servant acted reasonably and prudently under the circumstances. Assuming, without admitting, that there was some extra duty, or that it might by any streach of the imagination be considered that there was an emergency here, our situation is similar to the Burns case and I do not see what more the employer could have done than was done.

There being no proof that the death of the decedent was caused by any act of the employer which had been negligently performed, the motion for judgment in favor of the defendant is hereby granted.

Exhibit R-6.

The widow is not without remedy since it has been stated that an action is pending under the Workmen's Compensation Act and its prosecution was being delayed awaiting the outcome of this proceeding.

I am aware that my decision in this case will come as a disappointment to the bereaved widow and probably to her attorneys, and although in view of my decision any words which I might seek to offer in comfort might fall far short of accomplishing such purpose, I would like her to know that I am impelled (7) in arriving at my decision to decide questions submitted to me free of sympathy or prejudice and solely on what I believe the law to be. If I have erred, she is not without redress. Our Appellate Division works diligently and promptly, and does not hesitate to reverse if in their judgment it is deemed warranted.

I know also that it is of little comfort for counsel to be complimented when a decision is adverse to their cause. Nevertheless, I do want to compliment both of counsel. I think both of you tried your case exceptionally well. It was exceedingly pleasant for the court to sit and hear counsel unfold the various arguments that were presented and the evidence as it was submitted. I think this widow can take pride in the fact that she was very ably represented, and I do not make that as an idle comment. It is apparent that you have prepared your case exceptionally well.

I agree with you, Mr. Gordon, that it is apparent that you have put everything that you have into this case and you have brought from it everything that could possibly be brought. As I sat (8) and watched the case unfold —sometimes watching another work one can see things that probably one who is close to it might not have seen—it was an education to me and very instructive. Even though I hesitate to suggest to you what you might do, I am very happy to know that you have applied yourself to this case as diligently as you have and that you intend to probably go further with it.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956 1957

No. 408

HENRIETTA KREAM,
Petitioner,

v.

PUBLIC SERVICE COORDINATED TRANSPORT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

AARON GORDON,
Attorney for and of Counsel with Petitioner,
26 Journal Square,
Jersey City 6, New Jersey.

JOHN A. HARTPENCE,
JOHN W. OCKFORD,
Of Counsel with Petitioner.

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1. The petitioner's award for the death of her husband has been taken away from her without due process of law and in respect thereto she has been denied the equal protection of the laws, both guaranteed to her by the first section of the 14th Amendment to the Constitution of the United States and this deprivation of her constitutional rights can only be remedied by the issuance of the writ of certiorari herein applied for.

2. The order made by the Supreme Court of New Jersey on June 24, 1957, denying a rehearing to the petitioner on the said constitutional questions, and denying her an opportunity to be heard with regard to the new matter on which it based its decision and judgment on its asserted ground that rehearing was denied because no member of the majority moved for reconsideration, constitutes a deprivation of petitioner's rights to due process of law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. _____

HENRIETTA KREAM,

Petitioner,

vs.

PUBLIC SERVICE COORDINATED TRANSPORT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable the Chief Justice and the Associate Justices of the United States:

Your petitioner, Henrietta Kream, respectfully prays the issuance of a writ of certiorari to the Supreme Court of New Jersey, (a) to review the judgment and decision of that Court rendered on June 10, 1957, which judgment and decision affirmed the decision and judgment of the Superior Court of New Jersey, Appellate Division, of November 2, 1956. The judgment of the Appellate Division reversed the judgment of the Essex County Court, Law Division, which latter Court had affirmed the award of dependent's compensation made by the Workmen's Compensation Division of the New Jersey Department of Labor and Industry, to your petitioner, Henrietta Kream, the widow of the deceased workman, for the death of her husband from injuries to his heart as a result of an accident arising out of and in the course of his employment with the respondent.

In affirming the judgment of the Appellate Division, the Supreme Court of New Jersey unforseeably decided the case upon matters as to which there was no evidence before the court and contrary to the basis or theory of the case as accepted and tried and argued by both parties in all of the four tribunals of New Jersey, including the Supreme Court of New Jersey, which was the basis upon which the three tribunals below the Supreme Court of New Jersey grounded their respective decisions and judgments; furthermore, in affirming the judgment of the Appellate Division, the Supreme Court of New Jersey failed to apply or overrule the prior applicable decisions of courts, including its own, in that State; (b) also to review the order made by said Supreme Court of New Jersey on June 24, 1957, which denied the petition for a rehearing of the appeal of the petitioner, said petition for rehearing alleging that the judgment of the said Supreme Court deprived petitioner of property without due process of law and denied to the petitioner the equal protection of the laws, in contravention of Article 14, Section 1 of the Amendments to the Constitution of the United States.

Opinions Below.

The majority opinion in which four justices of the Supreme Court of New Jersey joined will be found on page 35 of the Appendix hereto and is reported in 24 New Jersey 432, 132 A. 2d 512 (1957), there being no dissenting opinion filed by any of the three justices who dissented.

The opinion of the Appellate Division will be found on page 1a of the Supplemental Appendix filed with the Peti-

tion for Certification in the Supreme Court of New Jersey and is reported in 42 N. J. Super. 307, 126 A. 2d 385 (1956).

The opinion of the Essex County Court, Law Division, will be found on pages 30a and 31a of the Appendix filed in the Appellate Division by the respondent and is not officially reported.

The opinion of the Workmen's Compensation Division of the New Jersey Department of Labor and Industry will be found on page 17a of the Appendix filed in the Appellate Division by the respondent and is not officially reported.

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked.

The petitioner contends that this court has jurisdiction to review the judgment in question upon writ of certiorari under the provisions of Title 28 United States Code, Section 1257 (3).

The judgment of the Supreme Court of New Jersey made and entered on June 10, 1957, in this action is repugnant to Article 14, Section 1 of the Amendments to the Constitution of the United States.

The order made and filed herein by the Supreme Court of New Jersey on June 24, 1957, denying the petition of the petitioner herein for a rehearing is likewise repugnant to said 14th Amendment.

The Federal questions sought to be reviewed were first raised in the Supreme Court of New Jersey, when that court, unforseeably decided the case upon matters not in the evidence and also failed to apply well-settled principles of law as to the facts in evidence, pursuant to the previous

decisions of all courts of New Jersey, including its own, without overruling such previous applicable decisions; the method of raising these Federal questions was by petition for rehearing in that court, which was timely, since it was done at the first opportunity; the way in which these Federal questions were acted upon by that court was by the entry of an order on June 24, 1957, pursuant to its Rule 1:9-4(c), that the petition for rehearing was denied because "no justice who voted with the majority having moved a reconsideration," which was not a denial on the merits and the Constitutional questions raised by petitioner were therefore never passed upon by that Court.

Questions Presented.

The questions presented by this petition are:

1. Did the Supreme Court of New Jersey transgress the 14th Amendment of the Constitution of the United States by deciding this case on new matters raised by it for the first time, in complete disregard of the evidence and of the theory on which both sides tried the case in the first instance and thereafter argued the three appeals in the Essex County Court, Law Division, in the Appellate Division, and in the Supreme Court itself, respectively, although such new matters had not been raised by either side in any of the four tribunals in New Jersey, without affording an opportunity to the petitioner to be heard on such new matters, particularly where the three lower tribunals, who heard the case, found as a fact, according to the evidence, that the driving of his bus by the petitioner's decedent, while in the commencement and throes of a heart attack,

aggravated the heart condition and caused his death, thereby denying to the petitioner "due process of law"?

2. Did the Supreme Court of New Jersey transgress the said 14th Amendment by failing to apply or overrule the well-settled principles of law as pronounced by all of the courts of New Jersey, including itself, that so long as the accident (in this case the driving of the bus after the start of and during the throes of the heart attack, aggravating, as it did, the heart condition and bringing about the death of petitioner's husband, is the accident), is one of the contributing causes of death, and it is not essential that the accident should be shown to be the sole contributing cause, compensation should be awarded, and thereby deny to the petitioner "the equal protection of the laws"?

3. Does the order made by the Supreme Court of New Jersey on June 24, 1957, denying a rehearing to the petitioner on the said constitutional questions and denying her an opportunity to be heard with regard to the new matters on which it based its decision and judgment on its asserted ground that rehearing was denied because no member of the majority moved for reconsideration, constitute a deprivation of petitioner's right to "due process of law"?

The Constitutional Provisions.

The applicable provisions of Amendment XIV, Section 1, of the Constitution of the United States, which govern the rights of the petitioner are:

> "* *; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." 1 U. S. C. A. Const. Anno. 49.

Statement of the Case.

R denotes Appendix for Respondent-Appellant filed in Superior Court of New Jersey, Appellate Division. SA denotes Supplemental Appendix to Petition for Certification filed in Supreme Court of New Jersey.

Petitioner, is the widow of Harry Kream the decedent whom she married on April 2, 1949, and lived with him as husband and wife until he died on February 2, 1952.

Harry Kream, was born on August 10, 1900, and died on February 2, 1952. Antecedent to February 2, 1952, the petitioner's decedent was a man who enjoyed reasonably good health suffering from an occasional cold for which he would receive medical treatment when necessary.

For a period of approximately fifteen years antecedent to February 2, 1952, Harry Kream was employed as a bus driver by the Public Service Coordinated Transport, a New Jersey corporation, which is the respondent in this case.

He performed his work without complaint in a competent manner.

His employment was regular with very little lost time during that period on account of sickness.

On the last day that he lived, February 2, 1952, Harry Kream called up his immediate superior, Fred Ulbrich, who is the station master at the garage of the Public Service Terminal at 20th Street and 16th Avenue in Newark, New Jersey, some time between 11:00 and 11:30 a. m., and told Mr. Ulbrich that he was ill. The place from where Harry Kream called Mr. Ulbrich on the phone was Military Park, in the City of Newark, which was a terminus of this bus--

the downtown terminus of the bus, and he told him that he had been sweating and had the chills and wanted to be relieved. Mr. Ulbrich told the petitioner's decedent that he would send a relief bus driver to relieve him at 14th Avenue and 19th Street in Newark. The petitioner's decedent then drove this Public Service bus from Military Park through the city streets of Newark on this particular day, which was a Saturday, performing the functions of a bus driver, driving his bus and taking on and discharging whatever passengers there might have been from Military Park and the city streets of Newark and through the various streets that he would customarily traverse with his bus on the route, until he got to 14th Avenue and 19th Street, where he was relieved by a bus driver named Edward Wayda, who had been sent to relieve the decedent by Mr. Ulbrich; to whom Ulbrich stated that he was to relieve the decedent because the decedent was sick.

Mr. Wayda, the relief bus driver, testified that it was around 11:37 a. m. on February 2, 1952, when he was sent out by Mr. Ulbrich to relieve Harry Kream and that he was told by Ulbrich to proceed to 19th Street and 14th Avenue to take over the bus when Harry Kream arrived there. He testified that Kream walked out of the bus; that he, Wayda, stood at the step, that he noticed that Harry Kream was sweating; that the sweat was coming from his brow, but it was not ordinary sweat, as he stated, for someone in the month of February outdoors, as Kream was, when he saw him sweating. Kream was coming out of the bus, or had come out of the bus; that when he saw this, he felt that Kream should have someone drive him home and he told Kream to call up the company and have someone drive his car home. He also testified that from his obsrvations, in

addition to the fact that Harry Kream had this perspiration coming from his forehead, that he would not say that Kream was well, except for that perspiration; in other words, he stated Kream looked sick to him. He testified, that the reason that he told the decedent to call up the company and have someone drive his car home was because he knew that the decedent was ill and he had perspiration coming down from his forehead, but the decedent, according to this witness, stated he didn't want to be bothered; got into his car and drove off.

A short time thereafter, the petitioner's decedent, drove his car, followed by the driver of another automobile immediately in back of him, who observed the petitioner's decedent fall with his head or saw his head drop; the upper part of his body drop towards the wheel of the car; the car seemed to be out of control; the car careened across to the opposite side of the street; mounted a curb; cut across through a hedge and was stopped by the wall of a building "with an impact which was not a strong one;" that when this man who was riding in back of the decedent's car reached him, he found him on the floor of the front seat of the car, bleeding from his lips or mouth, which was cut, trying to say something. He couldn't seem to articulate and within a few minutes thereafter, the decedent stopped these motions of his lips.

An ambulance from the City Hospital of Newark came at about 12:40 p. m. and the ambulance surgeon pronounced the man dead and his body was removed to the County Morgue of Essex County, where a post mortem examination was made of the decedent, as disclosed by Exhibit P-2 in evidence, which is the autopsy protocol.

The autopsy report or protocol showed, among other things, "One area of complete occlusion in the upper left anterior descending branch" and "Another area of occlusion in the large branch of the circumflex near its origin," the same being so set forth under the caption "Coronary Arteries" in the autopsy report.

Dr. Saul Lieb, a heart specialist, testified for petitioner on R146a-11 to 17, that the driving of the bus, after the onset of his coronary insufficiency, at Military Park, just before the decedent telephoned for relief from his job, aggravated his heart condition and that such driving of the bus while being in the midst of his heart attack contributed to his death. In this opinion he was joined by Dr. Michael Ritota, a heart specialist, who also testified to that effect for petitioner (R112a-31 to 35 and R138a-8 to 13).

Respondent's doctors, Dr. Jerome Kaufman and Dr. Jack York, on the other hand testified that the death was due to natural causes although both of them conceded under cross examination that the decedent, with an attack of coronary insufficiency should have been put to bed immediately when he was at Military Park where he had telephoned for relief, and should not have driven his bus during such a heart attack of coronary insufficiency.

The two experts for petitioner, Drs. Lieb and Ritota, had also testified that with an attack of coronary insufficiency the decedent should have been put to bed at once.

Reasons for Granting the Writ.

The Writ of certiorari should be allowed in the present case, because,

1. The petitioner's award for the death of her husband has been taken away from her without due process of law and in respect thereto she has been denied the equal protection of the laws, both guaranteed to her by the first section of the 14th Amendment to the Constitution of the United States and this deprivation of her constitutional rights can only be remedied by the issuance of the writ of certiorari herein applied for.

2. The order made by the Supreme Court of New Jersey on June 24, 1957, denying a rehearing to the petitioner on the said constitutional questions, and denying her an opportunity to be heard with regard to the new matter on which it based its decision and judgment on its asserted ground that rehearing was denied because no member of the majority moved for reconsideration, constitutes a deprivation of petitioner's rights to due process of law.

ARGUMENT.

The following is our argument amplifying the aforesaid reasons for the allowance of the writ:

(A).

In her claim petition for dependent's compensation filed with the Workmen's Compensation Division of New Jersey, the petitioner set forth the claim for compensable accident, to her decedent, as follows (R2a-35 to 40):

"17. What the nature of the accident, and how did it happen? Decedent became ill on his tour of duty. He was required and directed to drive his bus in that condition until he could be relieved. The exertion of so driving his bus aggravated his illness and resulted in his death on February 2, 1952 from injury to his heart."

The respondent's answer denied the accident (R7a).

At the conclusion of the trial in the Workmen's Compensation Division, the Deputy Director rendered his opinion (R17a) and thereafter entered an Award and Rule for Judgment for dependent's compensation in favor of the petitioner, the widow (R24a), stating on R25a that, "The accident and injury occurred as follows: Decedent while driving his bus suffered injuries to his heart which brought about his death."

The respondent thereupon appealed from the award and judgment of the Workmen's Compensation Division to the Essex County Court, Law Division, which affirmed the said award, by a judgment made and entered in the Essex County Court on April 30, 1956 (R36a). The preliminary and final oral decisions of the Essex County Court are on R30a and R31a, respectively. In his preliminary oral decision Judge Speakman sitting in the Essex County Court stated on R30a:

> "The case narrows down to the question of whether or not the continuous driving of the bus after the onset of the attack under the circumstances here constitutes an unusual strain. There is sufficient evidence in the record to justify the conclusion that the subsequent driving of the bus was the precipitating factor and did aggravate the condition, and the medical testimony supports that conclusion, but whether or not that constitutes an unusual strain within the

purview of our definition of that term or those terms to me is the final problem.

"I am going to give it a little more consideration."

In his final oral decision, Judge Speakman stated, on R35a:

> "The exertion and emotional and nervous strain he experienced thereafter driving the bus through the city streets of Newark for a mile and a half under that unusual condition of having the commencement or beginning of a coronary attack seems to me to constitute the unusual event or strain to satisfy the requirements of our rule. There is ample evidence in the form of expert testimony in the record to sustain the hypothesis that but for his continued employment, that is, for his continued driving of the bus after advising his superior that he was ill and not being relieved, he wouldn't have died at the time he did. It is not necessary that it be found that he certainly would have lived. It is only necessary under our cases to find that it was a reasonable probability that he would not have died when he did but for the continued driving.
>
> "Where, as here, an employer through its proper superior officer has knowledge that an employee is ill and he does not then relieve the employee of his duties, even though he does not expressly direct him to continue with them, the fact that the employee in furtherance of his employer's business continues to perform these duties in that condition seems to me to constitute the unusual event or exertion."

From the Essex County Court judgment the respondent appealed to the Superior Court of New Jersey, Appellate Division, which reversed the Essex County Court, its opinion being on SA1a. It is apropos to set forth the medical

proofs as stated by the Appellate Division on SA3a-26 to 40 and SA4a-5 to 8, as follows:

> "There is unanimity of opinion that decedent before the events of the day in question had a general condition of arteriosclerosis and that when he telephoned for relief he was in the early throes of a cardiovascular collapse. One expert for petitioner, Dr. Ritota, testified that any effort, even walking, was 'an imposition' upon the decedent's heart in his then condition and driving the bus was a 'contributing factor' to the death. Dr. Lieb testified for petitioner that the driving of the bus 'aggravated the attack of coronary insufficiency which had already had its onset and contributed to and hastened the death that eventually happened.'
>
> "Dr. York and Dr. Kaufman testified on behalf of respondent to the effect that there was no causal relationship between the driving of the bus and the death, although both admitted that the driving of the bus would not be medically indicated for a person undergoing the commencement of an attack of coronary insufficiency."

The Appellate Division then stated on SA5a-12 to 16 as follows:

> "The record is clear that in driving the bus from Military Park to the relief point the decedent was doing his everyday job in his normal manner and that no unusual strain or exertion was involved insofar as concerns the nature of the work done."

Thereafter followed the statement by the Appellate Division as to the position of petitioner, on SA5a-37 to 40 and SA6a-5 to 8, as follows:

> "Indeed counsel for petitioner at the argument candidly disclaimed any assertion of an emotional or

nervous strain and placed his case, as in the brief, on the flat position that the effort of driving the bus, while ordinarily not an unusual strain, became such when undertaken by a person then in fact undergoing a coronary attack, whether or not he knew what kind of illness had seized him."

The Appellate Division reversed the lower tribunals on the ground that there was no unusual exertion in the bus driving under the circumstances, stating that "we have no choice but to follow" the unusual exertion rule "insofar as concerns the nature of the work done."

It is vitally important to note that the Supreme Court of New Jersey in its opinion in the instant case did not affirm the Appellate Division on said basis at all and did not agree with nor accept such basis.

During the trial of the case Dr. Saul Lieb testified on R146a-11 to 17, that "the driving of the bus, after the onset of such an attack from a medical standpoint was certainly inadvisable and, in my opinion aggravated the attack of coronary insufficiency which had already had its onset and contributed to and hastened the death that eventually happened," and Dr. Ritota testified in similar vein on R112a-31 to 35 inclusive and on R138a-8 to 13 inclusive, and respondent conceded in its Supreme Court brief that they so testified. The only contention of the respondent at the trial in the Workmen's Compensation Division through its medical witnesses, was that the death resulted from natural causes—none of the three lower tribunals had before it any other evidence (and that was the only thing considered below therefore), than the exertion of driving the bus while decedent was in the throes of his heart attack—the same

evidence and contentions were before the Supreme Court of New Jersey.

There was no medical proof offered by the respondent that any other activity of the decedent, referred to by the Supreme Court in its opinion, was in any way connected with his death—no evidence on this score was offered by the respondent and therefore was not in the case. The only activity of the decedent contributing to his death was his driving of the bus while in the midst of his heart attack and on this score, the respondent stated, in its brief in the Appellate Division, in its brief in opposition to the petition for certification in the Supreme Court, and in its main brief before the Supreme Court on the appeal, as shown by copies of the pages of each of its said briefs, which are a part of the Appendix hereto, as follows:

> "The only exertion in this case is the normal, routine exertion of driving a bus, which Kream had done for years."

The respondent was arguing this way because under the unusual exertion doctrine as espoused by the prior decisions of the Supreme Court, there could only be a recovery in a heart case injury or death if the work entailed unusual exertion. Even at the oral argument before the State Supreme Court, not a single statement was made by counsel for respondent that there was any other exertion, according to the evidence, than driving the bus. Furthermore, not a single member of the Supreme Court, by word, hint or question, directed to either counsel during the oral argument, indicated any thought with regard to considering any other activity of the decedent, other than driving the bus, as a cause of the death. If any such idea had been forth-

coming from the Court during oral argument, we would at least have been afforded an opportunity to answer any question or questions in this regard. This alone, as we pointed out to the Supreme Court in our petition for rehearing, entitled us to have the requested reargument granted, for the rationale of the Supreme Court's opinion seems to be found in the following language:

> "We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line, or driving the bus or walking from the bus (across the street) to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor."

There was no need for speculation by the Supreme Court. There was the specific evidence that the driving of the bus in the midst of the heart attack aggravated the heart condition and brought about the death. There was no evidence offered by the respondent to show that any other activity, than bus driving, brought about the death, and the facet of reasoning on this score by the Supreme Court of New Jersey is without foundation, incongruous and unjustifiable.

It would appear that the Supreme Court was confronted with a dilemma requiring it to clarify its rule in heart cases to include unusual exertion by the worker as well as the unusual exertion in the employment. Faced with this problem, the Court in order to avoid any change in the rule introduced into the case that which had not been presented or argued in any of the three lower tribunals or in the Supreme Court. Having taken this course, the Supreme Court should have granted the requested rehearing in order to give the petitioner her opportunity to be heard and her day

in court on this foreign issue. By not granting the petition for rehearing, the Court arbitrarily denied petitioner due process of law, just as it had denied her both Constitutional rights under the 14th Amendment, Section 1, by its decision and judgment.

The facts legitimately found by a State Supreme Court may not ordinarily be subject to review by this court; but this does not mean that statements of fact erroneously made by it and having no foundation in the record, which is before this court, would be accepted by your Honors as concluding petitioner's constitutional right to due process of law—to an opportunity to be heard.

This Court, said, in the case of *Interstate Amusement Co.* v. *Olbert*, 239 U. S. 567:

> "It is settled that such findings of fact, in ordinary cases, other than those arising under the 'contract clause' of the Constitution, are binding upon this court. Waters-Pierce Oil Co. *v.* Texas, 212 U. S. 86, 97; Rankin *v.* Emigh, 218 U. S., 27, 32; Miedreich *v.* Lowenstein, 232 U. S., 236. But the rule has its exceptions, as, for instance, where there is ground for the insistence that a Federal right has been denied as the result of the finding that is without support in the evidence. Southern Pacific Co. *v.* Schuyler, 226 U. S., 601, 611; N. C. R. R. *v.* Zachary, 232 U. S., 248, 259; Carlson *v.* Washington, 234 U. S., 103, 106."

In the case of *Carlson* v. *Curtiss*, 234 U. S. 106, the Court said:

> "Among the assignment of errors is one contested on the refusal of the Supreme Court to find, as a fact, that the acts, for the performance of which plaintiff in error was held guilty of contempt were

done under the direction and authorization of officials of the War Department of the United States, acting in pursuance of and in accordance with the acts of Congress. While in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, *it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive the litigant of the benefit of a Federal right any more than it could do so by making findings that were wholly without support in evidence.* Just as this court, where its appellate jurisdiction is properly invoked and all evidence is brought before it, will, if necessary for a decision of the Federal question, examine the entire record, in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted Federal right. Southern Pacific R. R. *v.* Schuyler, 227 U. S., 601, and cases cited." (Emphasis ours.)

In the case of *N. C. R. R.* v. *Zachary*, 232 U. S., 258, 259, the Court said:

"It was, however, further held by the Supreme Court of North Carolina that deceased, at the time he was killed was not in fact employed by the Southern Railway, the lessee in the interstate commerce. There are several grounds upon which this decision was based, or upon which it is said to be supportable, and these will be separately noticed. Of course if upon the findings, any essential matter of fact was in doubt, it should have been submitted to the jury under proper instructions. The rulings of the trial court deprived plaintiff in error of the opportunity to go to the jury upon the question. But it is now

insisted that there was no evidence to show that the deceased was engaged in interstate commerce. This renders it incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. Southern Pacific R. R. *v.* Schuyler, 227 U. S. 601," (and cases cited).

In the case of *Southern Pacific R. R.* v. *Schuyler,* 227 U. S. 601, 611, the Court said:

"It is insisted (a) that there is no presumption that the Railroad Company violated the prohibition of the Hepburn Act by granting to Schuyler a free interstate ride, and that there is no evidence in the record to support such conclusion; and while it is conceded that ordinarily, upon writ of error to a state court this court does not revise the findings of fact, yet *it is insisted in this case that a Federal right has been denied as a result of a finding of fact, which is without support in the evidence;* that the evidence is before us in the record by which that insistence may be tested, and that the status of Schuyler as an interstate passenger is a mixed question of law and fact, and that *it is incumbent upon us to analyze the evidence to the extent necessary to give to plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded.* Kansas City S. Ry. Co. *v.* Albers Com. Co., 223 U. S., 573, 591; Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S., 665, 668; Creswill *v.* Knights of Pythias, 225 U. S., 246, 261." (Emphasis is ours.)

In the case of *Creswill* v. *Knights of Pythias,* 225 U. S. 246, 261, the Court said:

"• • • While it is true that upon a writ of error to a state court we do not review findings of fact

nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as a result of a finding of fact, which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; (b) that where a conclusion of law as to Federal right and finding of fact are so intermingled as to cause it to be essentially necessary for the purpose of passing upon the Federal question to analyze and dissect the facts, to the extent necessary to do so, *the power exists as a necessary incident to a decision upon the claim of denial of a Federal right.*" (Emphasis ours.)

That the judgment of the Supreme Court of New Jersey rendered without a trial or argument upon the new matters raised by it, would deprive Petitioner of her property, without due process of law, appears to be a proposition so plain, as to demonstrate itself—a mere statement thereof being sufficient. It is not probable that the term "due process of law" will ever be completely defined; the gradual process of definition by judicial exclusion and inclusion may go on indefinitely; but the definition had progressed far enough for all the purposes of the question herein raised by petitioner, very early in our jurisprudence—in fact, Mr. Webster's definition in the *Dartmouth College* case is sufficient.

Definition given in the text of Cyc., Vol. 81, p. 1080:

> "'Due process of law' in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for

the class of cases to which the one in question belongs. It has also been defined as: A law which hears before it condemns; which considers upon inquiry, and renders judgment only after trial. Law in its regular course of administration through courts of justice. A prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property. An orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard, and to define, enforce and protect his rights. * * *"

This Court said in the case of *Craig* v. *Harney*, 331 U. S. 367, 373, 374 (1947):

> "In a case where it is asserted that a person has been deprived by a state court of a fundamental right secured by the Constitution, *an independent examination of the facts by this Court is often required to be made.* See Norris *v.* Alabama, 294 U. S. 587, 590, 55 S. Ct. 579, 580, 79 L. Ed. 1074; Pierre *v.* Louisiana, 306 U. S. 354, 358, 59 S. Ct. 536, 538, 539, 83 L. Ed. 757; Chambers *v.* Florida, 309 U. S. 227, 228, 229, 60 S. Ct. 472, 473, 474, 84 L. Ed. 716; Lisenba *v.* California, 314 U. S. 219, 237, 238, 62 S. Ct. 280, 290, 291, 86 L. Ed. 166; Ashcraft *v.* Tennessee, 322 U. S. 143, 147, 148, 64 S. Ct. 921, 923, 88 L. Ed. 1192. This is such a case." (Emphasis ours.)

To the same effect is the case of *Kern-Limerick, Inc.* v. *Scurlock*, 347 U. S. 110, 121 (1954), wherein this Court held that the long course of judicial construction establishes as a principle "that *the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest*" (emphasis ours), citing numer-

ous decisions by this Court under footnote 11 on page 121 of 347 U. S.—in other words that a State Supreme Court does not speak with final authority in a case where a Federal Constitutional right is involved and in the instant case the State Supreme Court would not even consider or pass upon the merits of the Constitutional question.

In the leading case of *Saunders* v. *Shaw,* 244 U. S. 317 (1917), in a suit to enjoin the collection of drainage tax, evidence offered by the plaintiff to prove that his land could not be benefited by the drainage improvement was ruled to be inadmissible upon defendant's objection, but was spread upon the record as carried to the state Supreme Court upon appeal from the judgment in defendant's favor. The latter court, after affirming the judgment reversed it on rehearing and granted a permanent injunction against the tax upon finding from the answer and testimony before it that the land had not been and could not be benefited, and declined to consider defendant's application for further rehearing. *Held, that in thus rendering judgment against the defendant without affording him an opportunity to introduce evidence upon the question of benefit, there was a violation of due process of law, contrary to the Fourteenth Amendment.*

In the case of *Georgia Ry. & Elec. Co.* v. *Decatur,* 295 U. S. 165, 170, 171 (1935), this court held that where by state statute the basis for assessing a street railway company for the cost of paving a street between and along its tracks is benefits resulting to the railway, but the benefits are presumed from the assessment and the company attacking it must prove an arbitrary abuse of legislative authority in that no benefit accrued to the railway, a refusal of a

state court to "receive or consider any proof whatever," in defense of a suit to collect the tax, tending to prove that no benefit resulted, on the ground that such evidence is immaterial, "amounts to a denial of a hearing on that issue in contravention of the due process of law clause of the Constitution."

In the case of *Brinkerhoff-Faris Trust & Savings Company* v. *Hill, Treasurer and Ex-Officio Collector of Henry County, Missouri*, 281 U. S. 673, 681, 682 (1930), this Court said:

> "Our present concern, is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. Undoubtedly, the state court had the power to construe the statute dealing with the State Tax Commission; and to reexamine and overrule the Laclede case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. Compare Postal Telegraph Cable Co. *v.* Newport, 247 U. S. 464, 475-6."

(B).

As we have pointed out the driving of the bus by petitioner's decedent, while he was in the midst of a heart attack, aggravated his heart condition and brought about his

death. This hypothesis was proven and under the law in New Jersey reasonable probability is the touchstone and gauge of proof in a Workmen's Compensation case. The Supreme Court of New Jersey in the instant case re-stated the same to be the law in the following language,

> "In testing whether the petitioner has maintained the burden of proof we have held that the standard as to the quality of the evidence is probability rather than certainty, and if under the evidence the tendered hypotheses become a rational inference based upon the preponderance of probabilities the burden of proof is sustained. Gilbert *v.* Gilbert Machine Works, Inc., 122 N. J. L. 533 (Sup. Ct. 1939); Green *v.* Simpson & Brown Construction Co., 14 N. J. 66, 69 (1953); Mergel *v.* New Jersey Conveyors Corp., supra (14 N. J. 609, 613-1954)."

In the case of *Mergel* v. *New Jersey Conveyors Corp.*, cited in its said opinion in the instant case, the Supreme Court stated that,

> "Conclusive proof can seldom be offered and is not requisite. The standard is probability rather than certainty and if under the evidence the tendered hypothesis becomes a rational inference based upon a preponderance of probabilities, the burden of proof is sustained, Gilbert *v.* Gilbert Machine Works, Inc., 122 N. J. L. 533 (Sup. Ct. 1939); Green *v.* Simpson & Brown Construction Co., 13 N. J. 292 (1953)."

However, the Supreme Court of New Jersey failed to apply these principles to the instant case although it did not overrule same. Further, in the *Mergel* case, *supra*, the Supreme Court awarded compensation to the widow of Mergel in a situation where the decedent became ill on his job and as the Supreme Court stated,

> "He (Mergel) left the plant at 11:30 A. M. and about 1:50 P. M. he was found dead on the Exchange Place platform of the Hudson and Manhattan Tubes, a three minute walk from the plant,"

nevertheless the Supreme Court under such circumstances did not say "We are left to speculate," in the *Mergel* case, as to whether the walk to the tube station on a hot day, July 30, 1951, brought about the death nor did it say, "We are left to speculate" on what else he might have done in the 2½ hours which elapsed between the time Mergel left his job and the time he was found dead, but it unequivocally allowed compensation to Mergel's widow even though "the medical testimony was in dispute", as it frankly stated.

The Supreme Court of New Jersey further failed to apply and did not overrule the well-established rule of law in a Workmen's Compensation case in New Jersey that so long as the accident was one of the contributing causes, and it need not be the sole cause, of the injury or death, a compensable case is made out.

This rule was succinctly stated by the Court in *Cavanaugh* v *Murphy Varnish Co.*, 130 N. J. L. 107 (Sup. Ct. 1943), affirmed by the Court of Errors & Appeals, on the Supreme Court opinion, in 131 N. J. L. 163 (1944). Our former Supreme Court in the *Cavanaguh* case, *supra*, stated as follows, on page 111 of 130 N. J. L.:

> "As was said in Ciocca *v.* National Sugar Refining Co., supra: 'A compensable accident arises out of the employment when the proofs show that (1) the employment was one of the contributing causes without which the accident would not have happened,

> and (2) that the accident was one of the contributing causes without which the injury or death would not have resulted. Furferi *v.* Pennsylvania Railroad Co., 117 N. J. L. 508, 515, 189 Atl. Rep. 126. A compensable accident arises out of the employment when the proofs show a causal connection between the employment and the injury or death.'"

The Court in the quotation from the *Cavanaugh* case was referring to the opinion of the Court of Errors and Appeals in the case of *Cincca* v. *National Sugar Refining Co.*, 124 N. J. L. 329, 334 (1939).

This rule was reiterated and reaffirmed in the case of *Mixon* v. *Kalman*, 133 N. J. L. 113, 116 (E. & A. 1945), wherein Mr. Justice Heher stated in the opinion as follows:

> "If the employment was one of the contributing causes without which the accident would not have happened, the statutory language is satisfied. *These are settled principles of exposition in this state.* Geltman *v.* Reliable Linen and Supply Co., 128 N. J. L. 443." (Emphasis ours.)

In *Geltman* v. *Reliable Linen and Supply Co.*, 128 N. J. L. 443, 448 (E. & A. 1942), cited in the *Mixon* opinion, *supra*, Mr. Justice Heher stated:

> "It is the settled rule that if the employment 'is one of the contributing causes without which the accident which actually happened would not have happened', the statutory requirement in this behalf is met. Newcomb *v.* Albertson, 85 N. J. L. 435; Terlecki *v.* Strauss, 85 Id. 454; affirmed 86 Id. 708; Furferi *v.* Pennsylvania Railroad Co., 117 Id. 508."

Another leading case in New Jersey which followed this well established rule is *Schust* v. *Wright Aeronautical Cor-*

poration, 7 N. J. Super. 54, 58 (App. Div. 1950) which was a multiple sclerosis case; certification denied by Supreme Court in 5 N. J. 177 (June 26, 1950), wherein the Appellate Division stated as follows, on page 58 of 7 N. J. Super.:

> "The case of Marshall *v.* C. F. Mueller Co., 135 N. J. L. 75 (Sup. Ct. 1946), is also in point, stating: '* * * and it is not necessary that the accident should be shown to be the sole contributing cause of the injured condition of the employee. Furferi *v.* Pennsylvania Railroad Co., 117 N. J. L. 508; Davis v. Lotz, 126 Id. 615; Cavanaugh *v.* Murphy Varnish Co., 130 Id. 107; affirmed, 131 Id. 163.'"

This settled principle of law has been followed right down to the present time by all of our lower courts and by the Supreme Court of New Jersey. See the case of *Cierpial* v. *Ford Motor Co.*, 16 N. J. 561, 566 (1954), wherein it was stated, as follows:

> "However, where the employment is a contributing cause to the accident, the statutory requirement is met. The employment need not be the sole or proximate cause of the injury. It is sufficient if it is a necessary factor leading to the accident."

In the opinion of the Supreme Court in the instant case, it was stated, as follows:

> "They (the medical experts) were in agreement that the decedent had such an acute attack and that he had a general condition of arteriosclerosis so that, if he were *in the throes of a cardiac vascular attack, the driving of the bus* or in fact any exertion or activity *would have contributed to the final end result which was his death.*" (Emphasis ours.)

This being so, the driving of the bus was a contributing factor in Kream's death, driving the bus as he was, in the throes of a heart attack—the driving of the bus did not have to be the sole contributing factor in his death and under the rule stated above, the widow petitioner was entitled to recover compensation as a dependent of Kream. There was a finding by each of the three tribunals below the Supreme Court that the bus driving by Kream caused his death, but the Appellate Division had reversed the County Court on the ground that bus driving was Kream's daily job and therefore did not constitute unusual exertion "insofar as concerns the nature of the work done."

In disregarding and not applying the foregoing rules of law, the Supreme Court deprived petitioner of the "equal protection of the laws", in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

(C).

The petition for rehearing was filed under Rule 1:9-4(a) of the Supreme Court of New Jersey Rules within 10 days after judgment was entered. The Federal questions under the 14th Amendment, Section 1, of the Constitution of the United States were timely raised by said petition, because the rights of petitioner under the 14th Amendment had been violated for the first time, by the decision and judgment of the Supreme Court made and entered on June 10, 1957—*Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U. S. 673 (1930); *State of Missouri* v. *Gehner*, 281 U. S. 313 (1930)—it could obviously not have been done earlier by the petitioner.

The respondent filed its answer to the petition for rehearing, in which it presented no real argument in opposition to the petition on the Constitutional questions, making the bare statement that "it is difficult to see in what manner the due-process clause, on a federal basis, has any application."

The Petition for Rehearing and the Answer in Opposition are both submitted herewith as part of the record below.

The Supreme Court by order dated and filed on June 24, 1957, denied the petition on the ground, as stated in the order, that "no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied."

Not only was the door shut in petitioner's face by the denial of a rehearing but it was actually doubly shut in petitioner's face by the Court's rule that the door could only be reopened by the beckoning voice of one of its members who had first shut the door—he having decided adversely to the petitioner, first upon a foreign issue. This rule of the Supreme Court of New Jersey is Rule 1:9-4(c) which provide as follows:

> "A petition for rehearing is not subject to oral argument, and the petition will not be granted, unless a justice who concurred in the judgment or decision moves it and a majority of the court so determines."

This rule was originally Rule 1:4-8, effective September 15, 1948, under the new Court system of New Jersey but subparagraph (c), *supra*, was for the first time made a part

of the rule by amendment on December 7, 1950, when it was added thereto.

Where, as here, the application for a rehearing is predicated upon the decision of the court, based upon matters which were not argued either before the court or before either of the lower tribunals and specifically the point is made that the decision of the court is a denial of due process of law and of the equal protection of the laws, because of the lack of an opportunity to argue this new matter interjected into the case, the court in passing upon the application for a rehearing should do so on the merits and should not invoke or apply its ordinary rule which requires that upon an application for a rehearing, the motion to reconsider must be made by one of the justices who joined in the majority opinion. This rule in the ordinary situation may be salutary but where as here the Federal question is raised on the petition for rehearing, which could not have been raised in advance of the decision of the court, this rule should not be applied and it should be relaxed and the motion for rehearing should have been considered upon the merits of the application.

The reason for the rule is that in the ordinary case the applicant for a rehearing desires to reargue the points that have already been argued and in that situation the rule has a valid purpose but it should have no application where a petition for a rehearing is predicated upon the denial of the Federal Constitutional requirements, of due process and equal protection, arising from the decision of the State Supreme Court.

What petitioner was seeking on her rehearing petition was only a request to be heard. The Constitutional ques-

tions raised by petitioner were not passed upon nor determined to be with or without merit by the Supreme Court and petitioner now has exhausted her remedies under New Jersey procedure and her Constitutional rights are taken away as of this moment except for this Court's intervention.

It might be argued by the respondent that we have here, in this case, merely private litigation and that this court should probably not grant certiorari. Such an argument was answered by this court in the case of *Craig* v. *Harney*, 331 U. S. 367, 378 (1947), wherein this Court stated:

> "There is a suggestion that the case is different from Bridges *v.* California, supra, in that we have here only private litigation, while in the Bridges case labor controversies were involved, some of them being criminal cases. The thought apparently is that the range of permissible comment is greater where the pending case generates a public concern. The nature of the case may, of course, be relevant in determining whether the 'clear and present danger' rule is satisfied. But, the rule of the Bridges and Pennekamp cases is fashioned to serve the needs of all litigation, not merely select types of pending cases."

Actually, however, the constitutional right involved in the instant case is a matter of public concern, involving as it does, a Workmen's Compensation case and the beneficial and salutary provisions of Workmen's Compensation Laws in New Jersey and the other States of our country should be fostered and given full effect for the protection of industrial workers and their dependents and not curtailed by arbitrary rulings not based on the facts in evidence.

Where a constitutional right is involved, which a petitioner insists he or she was deprived of by the action of a state court, it matters not that such a petitioner is a convicted felon, a member of a group charged with disloyalty to and the advocating of the overthrow of our Government, or a plain everyday citizen of our country, such as the widow, petitioner in this case, and this court has repeatedly intervened to protect the constitutional rights of such person where the state process has been exhausted with such constitutional rights disregarded by and ignored by the State Court. It is well to quote the language of this court in the case of *Chessman* v. *Teets*, 354 U. S. 156, S. Ct. ,1 L. Ed. 2d 1253, 1260, 25 U. S. L. W. 4420, 4422 (June 10, 1957), that

> "Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist. * * * The proponent before the Court is not the petitioner but the Constitution of the United States."

Judicial fiat, just as legislative fiat, may not take the place of fact in the determination of issues involving life, liberty or property and if it does, a deprivation of due process of law results.

May we be permitted to be humane and say, with all sincerity, as men of flesh and blood and heart, that this bereaved widow, having been given an award which compensates her from a monetary standpoint, and so far as money can compensate, for the loss of her husband, should not be deprived of it by an arbitrary ruling without her day in court in violation of her Constitutional rights, as we sub-

mit, she was deprived by the State Supreme Court and she comes to this Court prayerfully asking for redress to the end that she be secured in her constitutional rights and thus realize the fulfilment of the hopes expressed in the words of this Court's opinion in the case of *Griffin* v. *People of the State of Illinois*, 351 U. S. 12, 16, 17, wherein Mr. Justice Black, as the voice of this court, wrote:

> "Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Charta: 'To no one will we sell, to no one will we refuse, or delay, right or justice. * * * No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land.'"

And thus may it be said that this helpless widow has not knocked upon the portals of this court in vain.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

AARON GORDON,
Attorney for and of counsel
with petitioner.

JOHN A. HARTPENCE,
JOHN W. OCKFORD,
Of counsel with petitioner.

APPENDIX.

Opinion of Supreme Court of New Jersey.

***Kream* v. *Public Service Coordinated Transport*; reported in 24 N. J. 432 (1957).**

Argued May 6, 1957; decided June 10, 1957.

On appeal from the Superior Court, Appellate Division.

Mr. Aaron Gordon argued the cause for the appellant; Mr. Milton Albert, attorney.

Mr. Henry J. Sorenson argued the cause for the respondent; Mr. David M. Sellick, attorney.

The opinion of the Court by delivered by Oliphant, *J.*

This is an appeal from a judgment of the Superior Court, Appellate Division, which reversed a judgment of the County Court that affirmed an award of compensation to the petitioner-appellant for the death of her decedent husband.

Decedent, aged 50, was a bus driver of the respondent and had been in its employ for several years. There is no proof in this case of a prior coronary involvement. On February 2, 1952, he apparently left his home in good health around 9:00 o'clock and reported for work at the garage of the respondent at 20th Street and 16th Avenue, Newark, N.J.; took out his bus and went on his regular run at 9:58 A. M. Later, at 11:35 A. M., he called the dispatcher, Ulbrich, at the garage stating he was at the end of the run at Military Park and requested that he be relieved of duty because "he had been sweating and he had chills". The decedent did not ask for medical attention and volunteered no information beyond saying he was having chills and fever and wanted to be relieved at the end of the particular

run he was then starting. He specifically asked to be relieved at 14th Avenue and 19th Street which is the regular relief point. When he had driven to work that morning before reporting to the garage he had parked his own automobile between 19th and 20th Street on 14th Avenue.

The dispatcher, at about 11:37 A. M., told the relief driver Wayda, to relieve the decedent as requested. Wayda got his things together and then proceeded to the relief point, a distance of some three blocks, and waited there for the arrival of the bus. He stated he got there about 11:50 and waited about five minutes for the bus which finally came along and that he noticed the decedent, Kream, was sweating which was unusual for that time of year, which was February. He testified "I told Harry Kream to call up the company and have someone drive his car home", and that Kream answered "He did not want to be bothered * * * that he would go home himself." He left the bus and walked across the street to where his car was parked.

The decedent started to drive home in his own car and had gone several miles when he apparently lost consciousness and his car veered across the street out of control, ran into a hedge and came to a stop against a retaining wall. A direct eye witness, one Bloom, who was experienced in first aid, crawled into the car to give aid and noticed that Kream was bleeding from the mouth and stayed with him until he died, which was about five minutes later and before the police arrived. He fixes the time very definitely as shortly after noon time because a minute or two before the accident, he was quite startled when the air raid siren went off just as he was passing the siren. A careful evaluation of the testimony supports the conclusions below that little weight should be given to testimony of a witness for the respondent that the decedent had gone back to the garage and visited for a while before starting for home.

An autopsy was performed on the body about two hours after death. The certification by the medical examiner indicates that the autopsy showed, among other things, "occlusive coronary arteriosclerosis". The "autopsy protocol" states, under item "15. Coronary Arteries"; "* * * one area of complete occlusion in upper anterior descending branch. Another area of occlusion in a large branch of the circumflex near its origin. No thrombi". The "primary cause of death" is given as "coronary arteriosclerosis, severe, occlusive". There was no involvement of the heart muscle.

The appellant did not press her compensation claim in the original instance, but instituted a common law action on the theory of *Szabo* v. *P. R. R. Co.*, 132 N. J. L. 331 (E. & A. 1945), alleging that the respondent was negligent in failing to provide medical treatment for its employee in an emergency and should have put in the reach of such stricken employee medical care which could have saved his life or possibly avoided further bodily harm. The trial court directed a verdict in favor of the respondent in that action. The same proofs put in that case are part of the record in the compensation hearing below and here.

It is perfectly clear from the record that it was never brought to the attention of the dispatcher that the decedent was seriously ill. All that the dispatcher knew was that he was sweating and having chills; neither was he aware that the decedent was undergoing a coronary attack of a severe nature as was later indicated by the autopsy, nor was there any prior history known to either the dispatcher or the decedent of a similar attack.

The medical experts disagreed as to whether the employment was a competent producing cause in aggravating the attack of acute coronary insufficiency. They were in agreement that the decedent had such an acute attack and

that he had a general condition of arteriosclerosis so that, if he were in the throes of a cardiac vascular attack, the driving of the bus or in fact any exertion or activity would have contributed to the final end result which was his death. In the type of attack he suffered, complete rest was the only thing that could have helped.

The Appellate Division found the record was clear that in driving the bus from Military Park to the relief point the decedent was doing his every day job in the normal manner, hence, there was no unusual strain or exertion with respect to the work done. It also found there was nothing in the proof to show that the decedent realized the serious nature of his illness or any indication he was suffering from emotional or nervous strain. They point out the fact he drove the bus to the relief point on his own suggestion and there rejected advice that he allow himself to be driven home by someone else was indicative to the contrary. As to the appellant's contention that the effort of driving the bus, while ordinarily not an unusual strain, became such when undertaken by a person then in fact undergoing a coronary attack whether or not he knew what kind of illness had seized him, they held this did not meet the intent of the line of decisions headed by *Lohndorf* v. *Peper Bros. Paint Co.*, 134 N. J. L. 156 (Sup. Ct. 1946), aff'd 135 N. J. L. 352 (E. & A. 1947).

Appellant argues as he did below that the inquiry here is: Shall compensation be denied to one who drives a bus in the midst of and during a heart attack and who meets with injury or death as a result of such work even though driving a bus was his regular employment? Of course, this statement of the proposition assumes that certain facts have been established.

In the ordinary course of events death normally ensues or results from natural causes. In many actions, both civil

and criminal, where the question arises whether the death resulted from other than natural causes, the one who asserts such a proposition has the burden of proving it. Thus we have held in compensation cases that there is a presumption that death from heart disease results from natural causes and the petitioner has the burden of proving that the death resulted from an accident arising out of and in the course of the employment. In order for the death to be compensable the evidence must preponderate in favor of such tendered hypotheses. *Mergel* v. *N. J. Conveyors Corp.*, 14 N. J. 609, 613 (1954).

In testing whether the petitioner has maintained the burden of proof we have held that the standard as to the quality of the evidence is probability rather than certainty and if under the evidence the tendered hypotheses become a rational inference based upon the preponderance of probabilities the burden of proof is sustained. *Gilbert* v. *Gilbert Machine Works, Inc.*, 122 N. J. L. 533 (Sup. Ct. 1939); *Green* v. *Simpson & Brown Construction Co.*, 14 N. J. 66, 69 (1953); *Mergel* v. *N. J. Conveyors Corp. supra.*

On the proofs before this court any inference that may be drawn would have to be based upon one of several possibilities. We are left to speculate as to what caused and when the onset of the original attack came. No rational inference based upon preponderance of probabilities can be drawn from the medical testimony as to what particular act of the decedent after the onset of the attack could have been a causative factor, if any, in the aggravation thereof. The only probable inference that can be drawn from the medical testimony is that any bit of exertion, either connected with or not connected with the employment, could have been an inducing factor in the fatal result here.

We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line,

or driving the bus or walking from the bus to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor. There is absolutely no proof in this case that any act related to the employment induced the onset of the original attack of which the original chills and perspiration are but probable symptoms.

We realize the difficulty of obtaining proofs in a situation such as this, but the Legislature has not decreed that every death occuring or injury sustained in employment must be compensated by the employer and until such time, the burden of proof established by the cases must be sustained by the petitioner. In this case it was not.

The judgment is affirmed.

Mandate on Affirmance of Supreme Court of New Jersey.

Appeal Docket No. 2199.

HENRIETTA KREAM, Petitioner-Appellant, *vs.* PUBLIC SERVICE COORDINATED TRANSPORT, Respondent-Respondent.	Civil Action. On Appeal. Mandate on Affirmance.

This cause having been duly argued before this Court by Mr. Aaron Gordon, counsel for the appellant and Mr. Henry J. Sorenson, Counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Appellate Division is affirmed without costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable Arthur T. Vanderbilt, Chief Justice, at Trenton on the 10th day of June, 1957.

JOHN H. GILDEA,
Clerk of the Supreme Court.

FILED
June 10, 1957
JOHN H. GILDEA,
Clerk.

Order Denying Petition for Rehearing.

SUPREME COURT OF NEW JERSEY.

HENRIETTA KREAM,
Petitioner-Appellant,
vs.
PUBLIC SERVICE COORDINATED TRANSPORT,
Respondent-Respondent.

Docket No. 2199.
On Petition for Rehearing.

This matter having been duly presented to the Court, and no justice who voted with the majority having moved a reconsideration, it is Ordered that the petition for rehearing is denied.

Witness, the Honorable Harry Heher, Presiding Justice, at Trenton, this twenty-fourth day of June 1957.

JOHN H. GILDEA,
Clerk.

FILED
June 24, 1957

JOHN H. GILDEA,
Clerk.

Copy of page 19 of brief of respondent-appellant, Public Service Coordinated Transport, filed in Superior Court of New Jersey, Appellate Division, and thereafter also filed in the Supreme Court of New Jersey (emphasis petitioner's):

Wayda who saw decedent at that point testified that Kream, who was sweating on the brow, performed the normal routine action of marking and finishing off his day card before turning the bus over to Wayda, after which Kream got up, stepped and walked out of the bus; his walk was the ordinary one, just the same as the witness and counsel would walk (R261a-25). Wayda gave no testimony regarding chills (R271a-35) and there was no testimony that Kream staggered or struggled out of the bus (R270a-27). Kream walked across the street to get into his parked car (R283a-35). The County Court further states (R34a-34):

> "* * * that when the decedent got out of his bus at the Military Park terminus and telephoned his superior he was at that time experiencing coronary insufficiency. * * *"

Kream did not state that he was experiencing coronary insufficiency or heart trouble of any kind; and a telephone call in the winter month of February to Ulbrich, a layman, meant a cold or attack of grippe; it is a matter of common knowledge that many persons work with these conditions and it is most unusual if they develop fatally. We contend that a physician with no prior information regarding Kream's arteriosclerotic and coronary condition would not have made a diagnosis of coronary insufficiency as a result of the information received in the February telephone call. The County Court further states (R35a-5):

> "* * * The exertion and emotional and nervous strain he experienced thereafter driving the bus

Copy of page 19 of brief of respondent-appellant, Public Service Coordinated Transport, filed in Superior Court of New Jersey, Appellate Division, and thereafter also filed in the Supreme Court of New Jersey
(continued from page 43).

through the city streets of Newark for a mile and a half under that unusual condition of having the commencement or beginning of a coronary attack seems to me to constitute the unusual event or strain to satisfy the requirements of our rule. * * *"

The only exertion in this case is the normal, routine exertion of driving a bus, which Kream had done for years. We contend the case contains no evidence of emotional and

Copy of page 9 of brief of respondent-respondent, Public Service Coordinated Transport, opposing certification, filed in Supreme Court of New Jersey (emphasis petitioner's):

ARGUMENT.

POINT I.

The Appellate Division did not commit legal error when, in deciding a Workmen's Compensation case, it used the well-established law in New Jersey which had been repeated time and time again by the Supreme Court.

The evidence discloses five episodes of motor vehicle driving by Kream: (1) The everyday driving of the bus and his private auto before February 2, 1952, (2) the driving of his own auto to the place he started work, (3) the usual and normal driving of the bus prior to the telephone call (R31a-23), (4) the usual and normal bus driving after the telephone call, and (5) the driving of his private auto about two miles across town to Hawthorne Avenue in the City of Newark before colliding with a wall. Episode No. 4 was selected by petitioner as being a compensable accident. The Appellate Division pointed out that the Deputy Director, in making an award, did not consider at all the question as to whether there was shown an unusual strain or exertion. The Appellate Division also pointed out that the "exertion and emotional and nervous strain" theory used as a basis to affirm the award in the County Court was entirely unfounded in the record (P5a-28). Counsel for petitioner on page 17 of the Petition states it was undoubtedly counsel's reasoning which led Judge Speakman in the County Court to rationalize the premise used for an award. Rationalization minus any factual support cannot serve as a basis for recovery. *The only exertion in this case is the*

Copy of page 9 of brief of respondent-respondent, Public Service Coordinated Transport, opposing certification, filed in the Supreme Court of New Jersey

(continued from page 15)

normal, routine exertion of driving a bus, which Kream had done for years. The case contains no evidence of emotional and nervous strain during the bus driving. You will not find it in the duties of the employment, which were the same before the telephone call as they were after. You

Copy of page 11 of brief of respondent-respondent, Public Service Coordinated Transport, filed in Supreme Court of New Jersey. (emphasis Petitioner's):

ARGUMENT.

POINT I.

The Appellate Division did not commit legal error when, in deciding a Workmen's Compensation case, it used the well-established law in New Jersey which had been repeated time and time again by the Supreme Court.

The evidence discloses five episodes of motor vehicle driving by Kream: (1) The everyday driving of the bus and his private auto before February 2, 1952, (2) the driving of his own auto to the place he started work, (3) the usual and normal driving of the bus prior to the telephone call (R31a-23), (4) the usual and normal bus driving after the telephone call, and (5) the driving of his private auto about two miles across town to Hawthorne Avenue in the City of Newark before colliding with a wall. Episode No. 4 was selected by petitioner as being a compensable accident. The Appellate Division pointed out that the Deputy Director, in making an award, did not consider at all the question as to whether there was shown an unusual strain or exertion. The Appellate Division also pointed out that the "exertion and emotional and nervous strain" theory used in the County Court was entirely unfounded in the record (P5a-28). Counsel for petitioner on page 24 of her brief states it was undoubtedly counsel's reasoning which led Judge Speakman in the County Court to rationalize the premise used for an award. The answer to this is—rationalization minus factual support cannot serve as a basis for recovery. *The only exertion in this case is the normal, routine exertion of driving a bus*, which Kream had done for years. The case contains no evidence of emotional and nervous strain during the bus driving. You will not find it in the duties of the employment, which were the same be-

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IN THE

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OCTOBER TERM, 1957.

No. 408.

HENRIETTA KREAM,
Petitioner,

v.

PUBLIC SERVICE COORDINATED TRANSPORT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

PETITIONER'S REPLY BRIEF.

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JOHN A. HARTPENCE,
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Of Counsel with Petitioner.

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PETITIONER'S REPLY BRIEF.

This short reply to respondent's brief in opposition to the petition for writ of certiorari is directed to two matters contained therein.

We have no wish to expand our argument for the writ or to reply to everything that is contained in respondent's brief, which we think would be unduly burdensome and unnecessary, because, we submit, repondent's brief does not meet the true basis for the application nor does it answer petitioner's argument.

However we feel we should not let pass the two matters to which we will direct our reply.

I.

The first of these, is an incomplete quotation from Dr. Lieb's testimony. We desire to supply the complete context of Doctor Lieb's answer to a question on cross examination. The incomplete version set forth in respondent's brief is misleading, and is obviously taken out of context of the answer as given.

II.

The other matter, is a misconception as to petitioner's main contention.

Respondent devotes a large part of its brief in demonstrating the existence of evidence which is not in dispute, and which in nowise refutes petitioner's contention.

As to the first matter, namely Dr. Lieb's testimony, respondent quotes it as follows (see page 5 of respondent's brief in opposition to petition for certiorari):

> "Dr. Saul Lieb, the Petitioner's other doctor, testified (Record 147a-18) that the driving of his own automobile 'sure was' inadvisable."

The record is as follows (R. 147a-20 to 36):

> "*Cross examination by Mr. Sellick:*
>
> . . .
>
> Q. Was the driving of his own car inadvisable? A. It sure was. (Witness nods head affirmatively.)
>
> Q. And that occurred closer to the death than the driving of the bus; isn't that true? A. It occurred

closer to the time of his death than the driving of the bus, but naturally, the driving of the bus was a much more major type of effort than the driving of his own automobile, and by the time he drove his own automobile, of course, his condition was much worse in any case because he had just finished driving the bus through the City Streets.

Q. What streets did he drive it through? A. Well, I know he drove from the downtown area of Military Park up to 14th Avenue and 19th Street. I know, too, that without knowing the exact route of the bus that he had to go through the downtown area.

Q. Do you know the distance between those points? A. I would guess that it's several miles, certainly."

Taken in its entirety, the testimony, thus elicited fully supports Petitioner's contention, and the off-hand and incomplete reference to Dr. Lieb's answer as set forth in respondent's brief simply avoids the issue.

As to the second matter, respondent first quotes from the State Supreme Court's opinion and then says in its brief (page 11):

"'We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line, or driving the bus or walking from the bus to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor. * * *'

"Upon that comment by the court of the possibilities involved in the case, the Petitioner attempts to raise the violation of a Federal right by charging that there was no evidence in support of the various items contained in the comment and that there was an interjection into the case of a new theory."

Petitioner made and makes no such charge. Petitioner charges that there was *no medical evidence* to support the State Supreme Court's speculation into other possible causes outside of the actual driving of the bus during the midst and throes of decedent's heart attack, and respondent, in its brief, did not and could not point out any such medical evidence because there was none.

Why there should be this misconception by respondent we do not know, because we stated plainly on page 15 of the petition for certiorari, that:

> "There was *no medical proof* offered by the respondent that any other activity of the decedent, referred to by the Supreme Court in its opinion, was in any way connected with his death—no evidence on this score was offered by the respondent and therefore was not in the case."

Respondent does not attempt to refute this contention, and rests content with reference to the record as to the non-medical testimony, (pages 11 and 12 of its brief). This non-medical testimony is not involved in any issue raised by petitioner, and in fact is set forth in detail on pages 6, 7 and 8 of the petition for certiorarj.

Again, respondent on page 13 of its brief, refers to "affirmative proof establishing the other activities." But this obviously relates to the non-medical testimony.

Further discussion would be merely repetitious of what has been said in the petition for certiorari.

It is not our intention to argue the entire case on the merits at this juncture—such an argument would follow the granting of the writ. We do submit, however, that we

have shown a right to our day in court; and in this regard the respondent's failure to meet the real issue presented, and its argument on the existence of *non-medical proofs* as an answer to our contention with respect to the absence of *medical proofs*, only tends to confirm our contention that we should have our day in court on the merits, which only this Court now can grant.

Conclusion.

We respectfully submit that the petition for a writ of certiorari should be granted.

AARON GORDON,
Attorney for and of Counsel with
Petitioner.

JOHN A. HARTPENCE,
JOHN W. OCKFORD,
Of Counsel with Petitioner.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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80 Park Place,
Newark, New Jersey.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The opinion of the Supreme Court of New Jersey (App. page 35 of Petition) is reported at 24 N. J. Reports, page 432. The opinion of the Appellate Division of the Superior Court of New Jersey is reported at 42 N. J. Superior Court Reports, 307. The opinion of the Essex County Court of New Jersey is not officially reported but is at page 31a of the Record. The opinion of the Division of Workmen's Compensation is not officially reported but is at page 17a of the Record.

Jurisdiction.

The Petitioner erroneously asserts that jurisdictional requisites exist under the "due process" and "equal protection of the laws" clauses of the Fourteenth Amendment.

Questions Presented.

1. Whether the judgment of the Supreme Court of New Jersey denying workmen's compensation payments to the Petitioner because she had failed to sustain the burden of proving that her decedent's death was by accident arising out of and in the course of his employment was in violation of a Federal right under the "due process" and "equal protection of the laws" clauses of the Fourteenth Amendment.

2. Whether the denial by the Supreme Court of New Jersey of a petition for rehearing raises a substantial Federal question upon the asserted grounds that such denial was a taking of property without due process of law and the denial to the Petitioner of equal protection of law.

Statute Involved.

Section 34:15-7 of the Revised Statutes of New Jersey under which section compensation for the death of an employee by accident arising out of and in the course of his employment shall be made by the employer.

Statement.

This litigation concerns a contention made by the Petitioner that her decedent met his death by accident arising out of and in the course of his employment with the Respondent.

The decedent suffered a fatal heart attack while driving his own automobile on a public street in the City of Newark as he was en route to his home after quitting his employment for the day. His death occurred shortly after noontime. The medical examiner's report of autopsy (Record 255a) gives the primary cause of death as coronary arteriosclerosis, severe, occlusive. The incidents preceding the fatal heart attack are briefly stated in the Supreme Court opinion as follows (24 N. J. 432, 433):

> "Decedent, aged 50, was a bus driver of the respondent and had been in its employ for several years. There is no proof in this case of a prior coronary involvement. On February 2, 1952, he apparently left his home in good health around 9:00 o'clock and reported for work at the garage of the respondent at 20th Street and 16th Avenue, Newark, N. J.; took out his bus and went on his regular run at 9:58 A.M. Later, at 11:35 A.M., he called the dispatcher, Ulbrich, at the garage stating he was at the end of the run at Military Park and requested that he be relieved of duty because 'he had been sweating and he had chills.' The decedent did not ask for medical attention and volunteered no information beyond saying he was having chills and fever and wanted to be relieved at the end of the particular run he was then starting. He specifically asked to be relieved at 14th Avenue and 19th Street which is the regular relief point. When he had driven to work that morn-

ing before reporting to the garage he had parked his own automobile between 19th and 20th Streets on 14th Avenue.

"The dispatcher, at about 11:37 A. M., told the relief driver Wayda, to relieve the decedent as requested. Wayda got his things together and then proceeded to the relief point, a distance of some three blocks, and waited there for the arrival of the bus. He stated he got there about 11:50 and waited about five minutes for the bus which finally came along and that he noticed the decedent, Kream, was sweating which was unusual for that time of year, which was February. He testified 'I told Harry Kream to call up the company and have someone drive his car home', and that Kream answered 'He did not want to be bothered * * * that he would go home himself.' He left the bus and walked across the street to where his car was parked.

"The decedent started to drive home in his own car and had gone several miles when he apparently lost consciousness and his car veered across the street out of control, ran into a hedge and came to a stop against a retaining wall. A direct eye witness, one Bloom, who was experienced in first aid, crawled into the car to give aid and noticed that Kream was bleeding from the mouth and stayed with him until he died, which was about five minutes later and before the police arrived. He fixes the time very definitely as shortly after noontime, because a minute or two before the accident, he was quite startled when the air raid siren went off just as he was passing the siren. * * *"

Doctors Saul Lieb (R. 146a-15) and Michael Ritota (R. 112a-31), witnesses produced by the Petitioner, testified that the driving of the bus contributed to the death. Doctors Jerome Kaufman (R. 231a-20) and Jack York (R.

222a-15) testified that the death was due to natural causes and that the driving of the bus did not contribute to the death.

The Petitioner's Doctor, Michael Ritota, testified (Record 126a-26):

> "I think I can say that the arteriosclerosis here was making progress from a long time back, even during this episode up to the time of death.",

and (Record 112a-2):

> "That any situation between the time that he had the initial chills and sweating until the time of death were an imposition and a load upon the heart. No matter what he did do in that period of time, like walking or driving a bus or any exertional activity was an imposition upon that work load of the heart.",

and (Record 113a-21):

> "* * * I'd even restrict him from extra motion in bed.",

if he were put to bed.

Dr. Saul Lieb, the Petitioner's other doctor, testified (Record 147a-18) that the driving of his own automobile "sure was" inadvisable and (Record 155a-29) that he would "* * * say he had an attack of acute coronary insufficiency in the natural course of the disease."

The Division of Workmen's Compensation awarded the Petitioner compensation where a finding was made that the death was by an accident which arose out of and in the course of the decedent's employment with the Respondent.

On the Respondent's appeal to the Essex County Court of New Jersey the Petitioner's award was affirmed.

On the Respondent's appeal to the Appellate Division of the Superior Court the judgment of the County Court was reversed.

The Supreme Court of New Jersey affirmed the judgment of the Appellate Division upon the ground that the Petitioner had failed to sustain the burden of proving that her decedent's death was by accident arising out of and in the course of his employment.

ARGUMENT.

The New Jersey Supreme Court did not deny the Petitioner equal protection of the laws in deciding that she had failed to sustain the burden of proof that her decedent's death was by accident arising out of and in the course of his employment.

The well-settled rule in New Jersey as applied to heart cases where compensation is sought under the New Jersey Workmen's Compensation Act is that there is a presumption that death from heart disease results from natural causes and that a petitioner has the burden of overcoming that presumption and to establish that the death was the result of an event or happening beyond the mere employment itself which brings about the final result or contributes thereto and without which the injury or death would not have resulted. The evidence must preponderate in favor of the tendered hypothesis. *Lohndorf* v. *Peper Bros. Paint Co.*, 134 N. J. L. 156 (Sup. Ct. 1946), affirmed 135 N. J. L.

352 (E. & A. 1947); *Ames* v. *Sheffield Farms Co., Inc.*, 137 N. J. L. 336 (Sup. Ct. 1948), affirmed 1 N. J. 11 (1948); *Seiken* v. *Todd Dry Dock Inc.*, 2 N. J. 469 (1949); *Grassgreen* v. *Ridgeley Sportswear Mfg. Co.*, 2 N. J. Super. 62 (App. Div. 1949); *Snoden* v. *Borough of Watchung*, 29 N. J. Super. 41 (App. Div. 1953), affirmed by Supreme Court 15 N. J. 376 (1954); and *Mergel* v. *N. J. Conveyors Corp.*, 14 N. J. 609 (1954). Implicit in the application of the above rule is the necessity of establishing by the burden of the proof causal connection between the event in the employment and the injury or death.

That the above rule referable to heart cases was applied by the New Jersey Supreme Court in the case at bar is manifest by the fact that the Court cites the *Mergel* case, *supra*, and summarizes its holding in full accord with the above statement of the rule. The state court in the application of the above rule pointed out in its opinion that:

(24 N. J. at p. 436)

> "In testing whether the petitioner has maintained the burden of proof we have held that the standard as to the quality of the evidence is probability rather than certainty, and if under the evidence the tendered hypotheses become a rational inference based upon the preponderance of probabilities the burden of proof is sustained." *Gilbert* v. *Gilbert Machine Works, Inc.*, 122 N. J. L. 533 (Sup. Ct. 1939); *Green* v. *Simpson & Brown Construction Co.*, 14 N. J. 66, 69 (1953); *Mergel* v. *New Jersey Conveyors Corp.*, *supra*.

(24 N. J. at p. 437)

> "On the proofs before this court any inference that may be drawn would have to be based upon one

of several possibilities. We are left to speculate as to what caused the original attack and when the onset came. No rational inference based upon preponderance of probabilities can be drawn from the medical testimony as to what particular act of the decedent after the onset of the attack could have been a causative factor, if any, in the aggravation thereof. The only probable inference that can be drawn from the medical testimony is that any bit of exertion, either connected with or not connected with the employment, could have been an inducing factor in the fatal result here.

"We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line, or driving the bus or walking from the bus to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor. There is absolutely no proof in this case that any act related to the employment induced the onset of the original attack of which the original chills and perspiration are but probable symptoms."

The New Jersey Supreme Court upon the record and the application of the above rule to the facts in the record found that the Petitioner had failed to sustain the burden of proof.

Thus a question involving an evaluation of the evidence and a determination of fact was presented to and resolved by the New Jersey Supreme Court. The litigation instituted by the Petitioner was fully heard by the Supreme Court of New Jersey in the regular course of judicial proceedings where the issue to be resolved was whether the Petitioner had sustained the burden of proving that her decedent's death resulted from an accident arising out of and in the

course of his employment. She failed in her action because the state court in evaluating the evidence as to quality concluded that no rational inference based upon preponderance of probabilities could be drawn supporting the hypotheses that the death resulted from an accident arising out of and in the course of the employment.

Whether the Petitioner had met the requirements of the New Jersey Workmen's Compensation Act so as to be entitled to payments thereunder was a question of local law as to which the decision of the New Jersey Supreme Court is binding upon this Court. *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64. The mere fact that the Petitioner was unsuccessful in her litigation does not show that there has been a violation of the "due process" of law or "equal protection of the laws" clauses of the Fourteenth Amendment. A question of fact decided by a state court will not ordinarily be made a subject for consideration by this Court. In *Aetna Life Ins. Co. v. Dunken*, 266 U. S. 389, 394, this Court stated:

> "* * * The rule is settled that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry here. See for example, *Missouri, K. & T. Ry. Co.* v. *Haber*, 169 U. S. 613, 639; *Smiley* v. *Kansas*, 196 U. S. 447, 453-454. To this general rule there are two equally well settled exceptions: '(1) Where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.' *Northern Pacific Ry. Co.* v. *North Dakota*, 236 U. S. 585, 593, and cases cited. See also *Truax* v. *Corrigan*, 257 U. S. 312, 324-325. * * *"

In an effort to obtain a review of the evidence by this Court and a finding of fact by this Court the Petitioner charges that the Supreme Court of New Jersey violated her right to due process and equal protection of the laws as guaranteed by the Constitution and that the violation by that Court consisted of a disregard and failure to apply a rule of law laid down in *Cavanaugh* v. *Murphy Varnish Co.*, 130 N. J. L. 107 (Sup. Ct. 1943), affirmed on Supreme Court opinion, 131 N. J. L. 163 (1944); *Ciocca* v. *National Sugar Refining Co.*, 124 N. J. L. 329 (E. & A. 1939); *Mixon* v. *Kalman*, 133 N. J. L. 113 (E. & A. 1945); *Geltman* v. *Reliable Linen and Supply Co.*, 128 N. J. L. 443 (E. & A. 1942); *Schust* v. *Wright Aeronautical Corporation*, 7 N. J. Super. 54 (App. Div. 1950), certification denied by New Jersey Supreme Court, 5 N. J. 177 (1950); and *Cierpial* v. *Ford Motor Company*, 16 N. J. 561 (1954). These cases stand for the proposition that a compensable accident arises out of the employment when the proofs show that the employment is one of the contributing causes without which the accident which actually happened would not have happened. In each of the cases the petitioner prevailed because the burden of proof had been sustained. The holdings in the cases cited by the Petitioner are in complete harmony with the opinion rendered by the New Jersey Supreme Court in the present case. If the Petitioner had produced evidence of the quality that a rational inference based upon preponderance of probabilities could have been drawn supporting the hypotheses that the death resulted from an event or occurrence beyond the mere employment itself, arising out of and in the course of the employment, the Petitioner would have prevailed.

The action of the New Jersey Supreme Court was not arbitrary but a deliberate determination rendered in the regular course of judicial proceedings in complete harmony with the controlling precedent. The decision and judgment meets fully with the requirement of "equal protection of the laws". The principal target at which the Petitioner levels criticism of the state court is the comment made in the opinion that:

> "We cannot speculate as to whether any exertion created by getting out of the seat of the bus at the end of the line, or driving the bus or walking from the bus to the parked car and then driving several miles before the fatal spasm in the attack could have been the inducing factor. * * *"

Upon that comment by the court of the possibilities involved in the case, the Petitioner attempts to raise the violation of a Federal right by charging that there was no evidence in support of the various items contained in the comment and that there was an interjection into the case of a new theory.

The evidence supporting the Court's comment will be found in the Record as follows:

As to getting out of the seat of the bus at the end of the line.

261a, lines 17-25 of the Record:

> "He was seated at t time I approached him and marked in his card. * * * He was finishing off his card that we have as a record in the bus, and then he got up and stepped out of the bus * * *."

As to walking across the street.

283a, lines 35 and 36 of the Record:

> Witness Wayda last saw the decedent "walking across the street to get into his car" which was parked "between 19th Street and 20th on 14th Avenue."

As to distance decedent drove his automobile after being relieved.

149a, line 9 of the Record:

> "I would guess that that distance was also several miles" from 14th Street and 19th Avenue to 478 Hawthorne Avenue where the fatal attack occurred.

As to the decedent's driving the several miles.

> The Petitioner at page 8 of her petition admits that the decedent was driving his own car and Witness Blum at 68a, line 15 of the Record directly testifies that he saw the decedent driving the car, veer off the road and hit a brick retaining wall on the left-hand side of Hawthorne Avenue.

Obviously the comments of the court find support in the evidence.

In relation to the assertion that the decision of the New Jersey Supreme Court rested upon a theory which the Court interjected into the proceedings for the first time, it is patent that the Petitioner overlooks the fact that she is endeavoring to seek benefits under specific legislation wherein statutory prerequisites are spelled out, all of which must be met by a preponderance of the evidence. The observation of the state court is to the effect that the items

referred to could be possibilities for the fatal collapse, but the hypotheses, tendered by the Petitioner, that the bus driving was a cause of the collapse had not been sustained by evidence of a quality that a rational inference based upon preponderance of probabilities could be drawn in support thereof.

The controversy involved in this litigation in each of the judicial proceedings has been whether the Petitioner's decedent met his death by an accident arising out of and in the course of his employment. The Petitoner's duty throughout the entire proceedings was to bear the burden of proof in overcoming the presumption that death was due to natural causes and to establish that the death was the result of an event or happening beyond the mere employment itself, which brought about the final result or contributed thereto and without which the death would not have resulted.

With respect to the statutory requirements, the Petitioner had full opportunity to be heard before the Supreme Court of New Jersey. It apparently is the view of the Petitioner that all evidence relative to other activities engaged in by the decedent should have been ignored by the court even though there is in the record affirmative proof establishing the other activities.

The petition for rehearing made to the Supreme Court of New Jersey was grounded upon the reasons urged by the Petitioner as a basis for the granting of a writ of certiorari by this court. At page 9 of the petition for rehearing addressed to the Supreme Court of New Jersey it appears that the Petitioner urged that the Fourteenth Amendment to the Constitution of the United States was violated by the

State Supreme Court in disregarding and not applying a rule of law laid down in the *Cavanaugh* case and other cases previously set forth, as well as in postulating that other activities of the decedent besides driving his bus could have brought about his death. The grounds stated to the New Jersey Supreme Court attempting to raise charges of the invasion of a Federal right were apparently an afterthought injected into the proceedings. The action of the New Jersey Supreme Court in denying the petition for rehearing was in full recognition of its determination that the Petitioner had failed to sustain the burden of proof and its conclusion "* * * the burden of proof established by the cases must be sustained by the petitioner. In this case it was not." Under such circumstances, particularly where a determination was solemnly arrived at in the regular course of judicial proceedings, the requirements of due process do not put the court under an obligation to grant a rehearing for no other purpose than reconsidering the persuasive qualities of all the testimony in the record.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRY J. SORENSON,
Counsel for Respondent.

September 11, 1957.